Petition

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

R. C. McCORMICK,

Petitioner, Plaintiff-Appellee
Cross-Appellant

versus

EDWIN EDWARDS, INDIVIDUALLY AND AS GOVERNOR OF LOUISIANA, WINGATE WHITE, INDIVIDUALLY AND AS EXECUTIVE DIRECTOR OF THE LOUISIANA COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF CRIMINAL JUSTICE, ET AL,

Respondents, Defendants-Appellants
Cross-Appellees.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether a non-civil-service state employee, engaged in neither policy-making nor confidential duties, is constitutionally protected from being discharged for exercising his First Amendment rights by becoming actively involved in a local election campaign where no interference in his job was shown.

2. Whether the reasoning in United States Civil Service Commission v. National Association of Letter Carriers, Broadrick v. Oklahoma, and United Public Workers of America v. Mitchell, interpretating Hatch Act regulations are applicable to non-civil-service employees where no statute exists regulating political activities.

3. Whether the principles set forth in Elrod v. Burns, Finkel v. Branti, and Perry v. Sinderman, apply only to political affiliation and belief and not political speech, activities, and association.

4. Whether in absence of a generic prohibition by a statute or regulation a state must show on a case-by-case basis a compelling interest that outweighs an employee's exercise of First Amendment rights.

5. Whether, given the trial court's finding that the employee was doing an exemplary job at the time of his activities and firing, any compelling interest requiring his dismissal was shown.

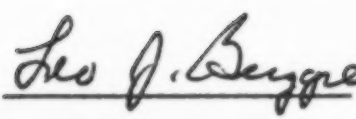
6. Whether, given the trial court's finding that the defendants were in bad faith, punitive damages should be assessed in addition to individual liability.

LIST OF PARTIES PURSUANT TO RULE 21.1(b)

1. Petitioner: R. C. McCormick (Plaintiff-Appellee, below)

2. Respondents: Edwin Edwards, then Governor of Louisiana; Wingate White, then Executive

Director of Louisiana Commission on Law Enforcement and Administration of Criminal Justice; Woodrow W. Dumas, then Mayor of Baton Rouge, Louisiana; Joseph Delpit, State Representative of Louisiana (Defendants-Appellants, below)



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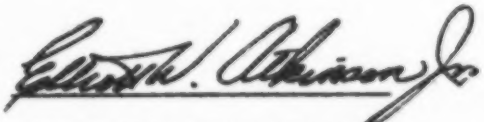

ELLIOTT W. ATKINSON, JR.

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PETITION FOR CERTIORARI

The petitioner, R. C. McCormick, plaintiff-appellee below, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on May 28, 1981, reversing the judgment of the United States District Court for the Middle District of Louisiana entered on September 26, 1979.

The Fifth Circuit has essentially held that no governmental employee per se has any First Amendment right of political expression and association.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as R. C. McCormick v. Edwards, Etc., Et Al, 646 F.2d 173 (5th Cir. 1981). The opinion of the District Court is reported as R. C. McCormick v. Edwards, Et Al, 479 F.Supp. 295 (M.D. LA. 1979). The opinions are reproduced in the Appendix commencing on pages 1a and 25a respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on May 23, 1981. A timely motion for rehearing was denied by that Court on June 22, 1981, and this petition for certiorari was filed within 90 days of that date. This Court has jurisdiction to review the judgment by Writ of Certiorari under 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES

I.

U. S. Constitution, First and Fourteenth Amendments. See Appendix "K" for verbatim text

at pp. 100a-101a.

II.

42 U.S.C. §1983. See Appendix "J" for verbatim text at p. 85a.

III.

Louisiana Revised Statute 23:961. See Appendix "G" for verbatim text at pp. 92a-95a.

IV.

Louisiana Constitution (1974) Article X, §2. See Appendix "E" for verbatim text at pp. 86a-89a.

V.

Louisiana Constitution (1974) Article X, §9. See Appendix "F" for verbatim text at pp. 90a-91a.

STATEMENT OF THE CASE

Plaintiff-Appellee, Cross-Appellant, R. C. McCormick, filed this lawsuit under 42 U.S.C. 1983, 1985, 1986 and 1988 because of his discharge as Program Director of the Capital District Law Enforcement Council as a result of his political activities on behalf of Jack Breaux, the Republican candidate for Mayor-President of Baton Rouge in 1976. Mr. McCormick, a Democrat, was a non-civil-service employee and a non-confidential and non-policymaking employee.

Made defendants were Edwin Edwards, who, as Governor of Louisiana, gave the direction to Wingate White to discharge McCormick. White, as McCormick's immediate supervisor, was also a party defendant as he discharged McCormick. McCormick had supported Jack Breaux for Mayor. Woodrow W. Dumas, a Democrat, the Mayor-President of Baton Rouge, was running for re-election in 1976 against Jack Breaux, Republican, and requested his political ally, Governor Edwards, to fire McCormick. Joseph Delpit, also a political ally of both Governor Edwards and Mayor-President Dumas, also requested Governor Edwards to fire McCormick. Pursuant to these requests, McCormick was discharged.

The District Trial Court found that McCormick was fired solely because of his political activity on behalf of Jack Breaux. Judge West also found that this activity did not impair his ability to effectively and fairly discharge the duties of his job. He further found that McCormick was doing not only a satisfactory job but also an exemplary job. He found that McCormick was neither a classified, confidential employee nor a policymaking employee. He held in favor of

McCormick and against all four defendants individually. He awarded $48,713.00 in damages and $15,000.00 in attorney fees to plaintiff. A decision (2-1) panel of the Honorable Fifth Circuit Court of Appeals reversed the District Court and held that McCormick's First Amendment rights to free speech and free political association are outweighed by the State's interest in regulating this kind of political involvement.

The Fifth Circuit based its reasoning on the basis that state and federal governments can constitutionally discharge civil service employees for precisely the same activities engaged in by McCormick. The panel majority felt that it would be an anomaly to hold that Governor Edwards and Wingate White could not discharge McCormick, a non-civil servant serving at their will, for engaging in activities for which a civil servant could be discharged. They held that McCormick's constitutional rights were no broader than those of other government workers. McCormick v. Edwards, 646 F.2d 173, 179 (5th Cir., 1981).

REASONS FOR GRANTING THE WRIT

The Fifth Circuit has ruled that no governmental worker has any First Amendment rights of political

expression or association by virtue of his government employment. The Fifth Circuit has held further that the reasoning in Elrod v. Burns and Branti v. Finkel does not apply to active expression and association.

ARGUMENT

The majority opinion of the Fifth Circuit over-extends the application of Hatch Act type provisions to unclassified governmental employees not intended to be subject to First Amendment restrictions. The Court held that as an unclassified governmental employee, the petitioner could be discharged for any reason, even for no reason at all, as long as he is not fired for a constitutionally impermissible reason. The Court then held since civil service employees could be fired for engaging in the same activities as McCormick because of constitutionally approved statutes, it was constitutionally permissible to discharge McCormick as a governmental worker per se. The Court specifically held that his rights could not be broader than those of civil service governmental employees whose rights have been restricted by statute. It is respectfully submitted that the law and established jurisprudence are just the opposite.

I. IN LOUISIANA, A NON-CIVIL SERVICE GOVERNMENT EMPLOYEE IS PROTECTED FROM DISCHARGE FOR EXERCISING HIS FIRST AMENDMENT RIGHTS

The majority opinion of the Fifth Circuit makes an overbreath application of Hatch Act type restrictive statutes in direct opposition to established law. In return for job security through successive governmental administrations, civil service employees bargained away certain basic First Amendment rights.

The unclassified employee has no such job security. He did not bargain away any First Amendment rights. In any change of administration, he can be dismissed for a variety of reasons, but not for the exercise of his First Amendment rights. To allow such a dismissal of unclassified government employees because classified may be dismissed for political activities is to overrule Perry v. Sindermann, 408 U.S. 593, 597, 33 L.Ed.2d 570, 577, 92 S.Ct. 2694 (1972). This case, at 408 U.S. 597, unequivocally states:

> "For at least a quarter century this Court has made clear that even though a person has no right to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit

> to a person that infringes upon his constitutionally protected interest --- especially his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to produce a result which (it) could not command directly." (Citations omitted, emphasis added.)

Unless restricted by a constitutionally approved statute or regulation, a governmental employee's First Amendment rights have not been waived or otherwise restricted. In Louisiana, R.S. 23:961 specifically prohibits any employer from threatening to discharge or from discharging any employee because of the employee's political activities or associations. (Appendix "G" at pp. 92a-95a). LA R.S. 23:961 has been the law of Louisiana since 1938, and no modification of this statute has ever been passed by the Legislature of Louisiana with regard to unclassified employees such as petitioner R. C. McCormick. It has been modified in regard to classified employees by Louisiana Constitution Article X, §2 (Appendix "E", pp. 86a-89a) and §9 (Appendix "F", pp. 90a-91a).

LA R.S. 23:961 has never been repealed and is presently on the statute books in Louisiana. Thus,

not only was Mr. McCormick well within the bounds of Louisiana law but also Louisiana law specifically prohibited his discharge for the very activities for which he was discharged.

II. THE CASES INTERPRETING THE VALIDITY OF "HATCH ACT" TYPE STATUTES ARE INAPPLICABLE.

To the contrary of the above existing statutes, the Appellate Court found McCormick could be fired because La. Constitution Article X, §§ 2, 9 prohibits political activities by classified employees and therefore by some unknown implication also covers unclassified employees. There is no statute prohibiting the exercise of First Amendment freedoms by non-classified employees. The Appellate Court erroneously relied on United Public Workers of America v. Mitchell, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947); United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548, 93 S.Ct. 3880, 47 L.Ed.2d 796 (1973); and Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973).

The above cases all involve the interpretation of state and federal statutes that restrict First Amend-

ment freedoms for classified employees for constitutionally permissible reasons. This case, however, as the dissenting judge in the Fifth Circuit noted, does not involve the application of a statutory or other regulatory prohibition of political activities. There is no generic state prohibition against the political activities McCormick engaged in. In fact, the contrary is true. There is a prohibition against his dismissal for such reasons, La. R.S. 23:961 (Appendix "G" at pp. 92a-95a). The Appellate Court ignored the latter statute. The District Court noted it in particular in that Court's well-reasoned decision.

This Honorable Court in Broadrick, supra, held the exact opposite of the Fifth Circuit below in the instant case. In Broadrick, this Court held that it did not deny classified employees equal protection of the law to prohibit them from political activities while unclassified employees could engage in political activities. The Fifth Circuit in this case stated:

> ". . . Thus, state and federal governments can constitutionally discharge civil service employees for precisely the same activities engaged in by McCormick. It would be an anomaly for us to hold that Governor Edwards

and Wingate White could not discharge McCormick, a non-civil servant serving at their will, for engaging in activities for which a civil servant could be discharged." McCormick, supra at 179, Appendix "A" at p. 14a.

Thus, the Fifth Circuit appears to hold that it denies classified employees equal protection for unclassified employees to be able to exercise political rights under the First Amendment.

III. THE PRINCIPLES SET FORTH IN ELROD V. BURNS, BRANTI V. FINKEL AND PERRY V. SINDERMANN APPLY TO POLITICAL SPEECH, ACTIVITIES AND BELIEF.

The majority erred in their narrow and restrictive interpretation of Elrod and Branti.

In Elrod v. Burns, 427 U.S. 347, 357, 49 L.Ed.2d 547, 556, Justice Brennan stated:

> "And though freedom of belief is central, [t]he First Amendment protects political association as well as political expression. Buckley v. Valeo, supra, at 15, 46 L.Ed.2d 659, 96 S.Ct. 612. There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of "orderly group activity" protected by the First and Fourteenth Amendments. (citations omitted) The right to associate with the political party of one's choice is an integral part of this basis constitutional freedom. Kusper v. Pontikes, 414 U.S. 51, 56-57, 38 L.Ed.2d 260, 94 S.Ct. 303 (1973)."

In Branti v. Finkel, 445 U.S. 507, 516, 63 L.Ed.2d 574, 582-583, 100 S.Ct. 1287 (1980), this Court addressed an argument which would limit the application of Elrod v. Burns:

> "Petitioner argues that Elrod v. Burns should be read to prohibit only dismissals resulting from an employee's failure to capitulate to political coercion. Thus, he argues that so long as an employee is not asked to change his political affiliation or to contribute to or work for the party's candidate he may be dismissed with impunity -- even though he would not have been dismissed if he had the proper political sponsorship and even though the sole reason for dismissing him was to replace him with a person who did have such sponsorship. Such an interpretation would surely emasculate the principles set forth in Elrod . . . ." (Emphasis added)

McCormick's case is actually far more aggravated and clear than a belief or affiliation factual situation. Direct and malicious coercion was present. He chose to aid a Republican candidate for mayor against a Democratic encumbant. His employment position was not even with local government. Yet, he was fired for daring not to "toe the line" and support the local mayor, who, the evidence clearly established, was a close political ally of Governor Edwards.

Yet, the majority in the Court below held:

> "McCormick's reliance on Elrod and Branti is misplaced. These cases are clearly limited

> to situations in which employees are discharged solely because of their political affiliation or beliefs. McCormick does not contend that he was terminated because he was a Republican, a Democrat, or a member of any particular party, or because he held certain beliefs. He was discharged because of his active participation in the 1976 Baton Rouge mayoralty campaign. Neither Elrod nor Branti deals with a situation similar to the one before this Court."

[McCormick v. Edwards, 646 F.2d 173, 178 (5th Cir. 1981)]. (Appendix "A" at p. 11a).

The law is just the opposite to the Fifth Circuit's holding. The rights of free political speech and association were recognized as established rights before the decisions of Elrod and Branti. The latter cases actually added political belief and affiliation as being within the First Amendment protection for which a person could not be dismissed for exerting. The District Court applied the "principles" as stated in Elrod v. Burns, supra, and recognized them as established long before the Elrod decision.

The lower court, in its opinion at 479 F.Supp. 295, 300 (1979), quoting from the Elrod decision, said:

> "Political belief and association constitute the core of those activities protected by

> the First Amendment. Regardless of the nature of the inducement, whether it be by the denial of public employment or, as in Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), by the influence of a teacher over students, if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein. Id., 319 U.S. at 642, 63 S.Ct. at 1187. And, though freedom of belief is central, the First Amendment protects political association as well as political expression. Buckley v. Valeo, supra, 424 U.S. at 11, 96 S.Ct. 612 at 632, 46 L.Ed.2d 659."

It is abundantly clear that the unclassified governmental employee cannot be fired for exercise of his First Amendment rights. Perry v. Sindermann, supra.

IV. ABSENT A GENERAL PROHIBITION BY STATUTE OR REGULATION, A STATE MUST SHOW A COMPELLING INTEREST THAT OUTWEIGHS THE INDIVIDUAL EMPLOYEE'S EXERCISE OF HIS FIRST AMENDMENT RIGHTS.

The majority opinion essentially adopts the defendants' assertion that considering the nature of McCormick's job, the State's interest in limiting his political activities outweighs his own First Amendment interests. Yet, the majority rely on cases dealing with statutory law prohibiting partisan political activity. The Court reasons that since there exists a

sufficient governmental interest to validate a statute prohibiting political activity for classified employees, the same constitutionally sustaining interest must exist to prohibit activity for any given unclassified employee even absent any legislative action. McCormick v. Edwards, Et Al, 646 F.2d 173, at 179 (5th Cir. 1981). (Appendix "A" at p. 14a)

Other than the Court's reference to "a good and harmonious relationship is necessary to the success of our mission" in the first letter of warning, [McCormick, supra at 175, Appendix "H" at p. 96a], no other finding was made in connection with the nature of plaintiff's job.

The Court stated that they must decide whether the State's interest in prohibiting its employees from engaging in such activities outweighs the employee's rights and simply found a sufficient interest for the State to prohibit all governmental employees from such activities.

The Fifth Circuit ignored its own recent ruling in Van Ooteghem v. Gray, 628 F.2d 488 (5th Cir. 1980) holding a state cannot prevent the speech of its citizens absent a compelling state interest, and in the

employment context the compelling state interest standard is satisfied only upon proof that regulation of speech is necessary to prevent material and substantial interference with the operation of a public department. Again, the Fifth Circuit overlooked its previous holding that continuance in employment cannot be based on political adherence. Davis v. Williams, 598 F.2d 916 (5th Cir. 1979). The Court in Davis held that municipal employees may not be discharged pursuant to a legislative scheme that broadly stifles the exercise of fundamental personal liberty. But what about the instant case where no scheme, legislative or otherwise, exists?

Given the specific finding of the trial judge that McCormick's political activities did not impair his ability to effectively and fairly discharge his public office and that he not only did a satsifactory job but also an exemplary one, where is the compelling government or state interest to justify infringement of McCormick's First Amendment rights?

In Van Ooteghem v. Gray, 628 F.2d 488, 492 (5th Cir. 1980), the court limited an appellate review of the trial court's conclusions as to whether there was

in fact disruption in the work place due to the employee's exercise of his First Amendment rights to those cases where the trial judge was clearly erroneous. Here the Fifth Circuit made no such finding. The trial judge found that McCormick's exercise of his First Amendment rights did not disrupt his work place, and this finding was not held erroneous.

The right of free association may not be abridged merely because its exercise may be annoying to some people. Hastings v. Bonner, 578 F.2d 136, 141 (5th Cir. 1978); Coates v. City of Cincinnati, 402 U.S. 611, 615, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971). No one, other than defendant Mayor Dumas and defendant Delpit, complained about McCormick's political activities. The Fifth Circuit held that the district court's finding that the involvement of McCormick in the mayoralty campaign as the reason for his dismissal was not clearly erroneous. Thus, the jurisprudence requiring a compelling state interest in these circumstances must be reviewed.

In Pickering v. Board of Education, 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), the court said:

> "The theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected. (Citation omitted) At the same time it cannot be gainsaid that the state has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with the regulation of the speech of the citizenry in general. The problem . . . is to arrive at a balance between the interests of the teacher (employee) as a citizen and the state as an employer."

And again in Pickering, at pages 572-573, the court said:

> " . . . What we do have before us is a case in which a teacher (employee) has made . . . public statements . . . which are critical . . . which are neither shown nor can be shown to have impeded the teacher's (employee's) proper performance of his daily duties."
>
> " . . . In these circumstances, we conclude that the interest of the school administration (State of Louisiana) in limiting teachers' (employees') opportunities to contribute to public debate is not significantly greater than the interest in limiting a similar contribution by any member of the general public." (additional language inserted.)

Considering the above and foregoing quote from Pickering, it is clear that in the present case if Governor Edwards could legally suppress any citizen from expressing support for Jack Breaux for Mayor of

Baton Rouge, then and only then could he legally and constitutionally fire R. C. McCormick for expressing support for Jack Breaux. Clearly that is not the case here in America. Robust debate is encouraged here and expression in the political arena must be given the fullest extension.

Where is the exacting scrutiny by the appellate panel applicable to limitations on core First Amendment rights? Where in the record did the State demonstrate any compelling or even legitimate state interest? What means did the State use? Any complaints were never explained. When fired, he was never told the real reasons. No hearing was held prior to his firing. Compelling state interest cannot be supplied by the appellate court without any substantial support in the record or findings by the trial court. In Re Primus, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978). A mere legitimate state interest in the nature of McCormick's job will not suffice. Kusper v. Pontikes, 414 U.S. 51, at 58, 38 L.Ed.2d 260, 94 S.Ct. 303 (1973).

The First Amendment affords the broadest protection to political expression as to public issues in

order to assure the unfettered interchange of ideas for bringing about political and social changes desired by the people. A major purpose in the Amendment is to protect the free discussion of governmental affairs, including a discussion of candidates. Buckley v. Valeo, 464 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976).

Because the First Amendment needs breathing room to survive, government may regulate in the area only with narrow specificity. This Court stated the matter completely in NAACP v. Button, 371 U.S. 413, at 433, 9 L.Ed.2d 405, 83 S.Ct. 328 (1963):

> "It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny. Buckley v. Valeo, 424 U.S. at 64-65, 46 L.Ed.2d 659, 96 S.Ct. 612; NAACP v. Alabama, 357 U.S. at 460, 461, 2 L.Ed.2d 1488, 78 S.Ct. 1163. This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action but indirectly as an unintended but inevitable result of the government's conduct . . . Buckley v. Valeo, supra, at 65, 46 L.Ed.2d 659, 916 S.Ct. 612 . . . .
>
> Thus encroachment 'cannot be justified upon a mere showing of a legitimate State interest.' Kusper v. Pontikes, 414 U.S. at 58, 38 L.Ed.2d 260, 94 S.Ct. 303. The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest. (Citations omitted)

Elrod v. Burns, 427 U.S. 347 at 362, 49 L.Ed.2d 547, 559, 96 S.Ct. 2673 (1976)."

The factual context of this case leaves no doubt, as expressed by both the trial court and the Fifth Circuit, that Mr. McCormick could have been reinstated to his job if he would have agreed to discontinue his political activities on behalf of Jack Breaux. At a meeting at the Governor's mansion, in the presence of an overwhelming majority of the Board of Directors of the Capital District Law Enforcement Planning Council, Governor Edwards told this to McCormick. Both Mr. McCormick and Governor Edwards agreed to the gist of this conversation. The price to be paid for exercising his First Amendment rights was his job -- a job in which the State had no compelling interest and a job which could be performed under the Branti test by anyone regardless of political affiliation.

If it is true that each citizen possesses certain inalienable rights, how can the Fifth Circuit alienate them without the exacting scrutiny mentioned above? McCormick did not alienate these basic rights, nor did other unclassified employees by any Hatch Act bargaining process in return for employment security.

> "Dismissal or the threat thereof for political patronage reasons is, of course, the ultimate means of achieving by indirect command to a government employee to cease exercising protected rights of free political association and speech. This is Elrod's and Branti's specific, narrow application of the principle. [Delong v. United States, 621 F.2d 618 (4th Cir. 1980)]." (Emphasis added)

In the present matter, there was no indirect infringement as dealt with in Elrod and Branti. In McCormick, his dismissal for exercising his First Amendment rights was blatant, direct and malicious. It was even stated in the letters of termination. (Appendix I). In absence of any statutory authority that has withstood a constitutional test, the governmental compelling interest test must be met with exacting scrutiny. Vincent v. Maeras, 447 F.Supp. 775 (D.C. 1978). Lastly, in Elrod v. Burns, 427 U.S. 347, 368, the court stated:

> "Since, as we have noted, it is the government's burden to demonstrate an overriding interest in order to validate an encroachment on protected interests, the burden of establishing this justification will rest on the petitioners on remand, cases of doubt being resolved in favor of the particular respondent."

In this case, that burden was not carried by the defendants in any respect, and therefore the issue

must be resolved in favor of petitioner. The District Court found no interference in his job created by his activities and no compelling interest that outweighed McCormick's rights. The District Court further found the defendants to be in bad faith in McCormick's dismissal. McCormick v. Edwards, 479 F.Supp. 295, 301-302 (1979).

V. GIVEN THE FINDING OF BAD FAITH, PUNITIVE DAMAGES SHOULD HAVE BEEN AWARDED.

The trial court found without question that the defendants were in bad faith applying legal standards applicable. McCormick v. Edwards, 479 F.Supp. 295, 301-302 (1979). By the criteria set forth by Justice Brennan in Adicks v. S. H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970), punitive damages should have been awarded. Plaintiff clearly met his burden of proof. No real deterrent effect has yet been realized in Louisiana in cases involving impermissible political discharges. The public interest must be vindicated in deterring malicious and wanton conduct by public officials. Aumiller v. University of Delaware, 434 F.Supp. 1273 (D.C. Del. 1977); Guzman v. Western State Bank of Devil's Lake, 540 F.2d 948 (8th Cir. 1976).

CONCLUSION

The Fifth Circuit has in all practical respects ruled that no government employee, federal, state or local, has the right of political expression or association free of the threat of or actual forfeiture of employment. Whether he is classified and covered by statutory prohibitions or unclassified and not covered by statute does not seem to matter. This holding is contrary to the law of the United States as contained in this Court's prior decisions. The Fifth Circuit's decision does away with the necessity for government to prove a compelling interest with exacting scrutiny on a case-by-case basis where no statutory prohibitions exist. The decision is contrary to law and to the prior expressions of the United States Supreme Court and should be reversed and the District Court judgment reinstated with punitive damages awarded in addition based on the clear finding of bad faith.

Respectfully submitted,

Leo J. Berggreen
LEO J. BERGGREEN

Elliott W. Atkinson, Jr.
ELLIOTT W. ATKINSON, JR.

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Petititon for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been served on the Honorable R. Gordon Kean, Jr., attorney for Woodrow W. Dumas, on Camille Gravel, attorney for Edwin W. Edwards and Wingate White, and on William H. Cooper, attorney for Joseph A. Delpit, by depositing said copies in the United States Mail, postage prepaid, this 25th day of August, 1981.

I further certify that all parties required to be served have been served.

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Appendix

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APPENDIX

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

R. C. McCORMICK,

Petitioner, Plaintiff-Appellee
Cross-Appellant

versus

EDWIN EDWARDS, INDIVIDUALLY AND AS GOVERNOR OF LOUISIANA, WINGATE WHITE, INDIVIDUALLY AND AS EXECUTIVE DIRECTOR OF THE LOUISIANA COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF CRIMINAL JUSTICE, ET AL,

Respondents, Defendants-Appellants
Cross-Appellees.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

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APPENDIX "A"

R. C. McCormick, Plaintiff-Appellee - Cross-Appellant,

vs.

Edwin W. Edwards, Etc., Et Al, Defendants-Appellants - Cross-Appellees

No. 79-3753

United States Court of Appeals,
Fifth Circuit,
Unit A

May 28, 1981

Appealed from the United States District Court for the Middle District of Louisiana

Before AINSWORTH and SAM D. JOHNSON, Circuit Judges, and HUNTER, District Judge.

AINSWORTH, Circuit Judge:

The appellants, Edwin Edwards, a former Governor of Louisiana, and three other government officials,[1] appeal from the judgment of the district court, 479 F.Supp. 295, holding them liable for damages based on allegations that they conspired to bring about the termination of the appellee, R. C. McCormick, from his position as Program Director of the Capital District Law Enforcement Planning District in violation of 42 U.S.C. § 1983. The district court held that McCormick was unlawfully discharged because of

his political activities and found the defendants personally liable in their individual capacities for damages, including attorney's fees, in the amount of $63,713. Appellants raise several issues on appeal. First, they contend that two of the appellants, Governor Edwards and Wingate White, are immune from personal liability. They also maintain that McCormick was a policy-making or confidential employee and thus not entitled to the same protection against patronage dismissal as other employees. Appellants also assert that, considering the nature of McCormick's job, the State's interest in limiting his political activities outweighs his own First Amendment interests. Finally, the appellants contend that the activities engaged in by McCormick are not of the kind entitled to protection under Elrod v. Burns, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), and later cases. The last two issues are closely related since Elrod determined what activities are entitled to protection by balancing the interests of the state with the First Amendment and other interests of the employee. We agree that McCormick's activities are not protected by Elrod or otherwise since the State's interest in

regulating this kind of political involvement outweighs the employee's interests. It is therefore not necessary to discuss the other issues.

THE FACTS

The federal statutory scheme which established the Law Enforcement Assistance Administration (LEAA) and provided for LEAA grants to assist states in their law enforcement efforts, required each recipient state to establish a law enforcement planning agency. 42 U.S.C. § 3723 (repealed 1979).[2] The statute also authorized the state to create regional planning groups "comprised of a majority of local elected officials." Id. In 1972, Governor Edwards complied with the federal statute by establishing the Louisiana Commission on Law Enforcement and Administration of Justice (the "Commission") and, under the Commission, nine regional planning groups including the Capital District Law Enforcement Planning District (the "Planning District"). The Governor appointed Wingate White Executive Director of the Commission and White, after consulting with the Governor's office, appointed R. C. McCormick District Program Director of the Planning District. In 1975, McCormick resigned his

position to run for sheriff of East Baton Rouge Parish. He was rehired shortly after being defeated in that election.

McCormick actively supported the candidacy of Jack Breaux in the 1976 Baton Rouge mayoralty election. He held a party at his home in support of Breaux's campaign, distributed cards for the candidate and spoke on Breaux's behalf at a public meeting held at a local school. Breaux's opponent, Mayor Woodrow W. Dumas, was disturbed by McCormick's role in the campaign and complained to Governor Edwards. Joseph Delpit, a state representative from Baton Rouge, also complained to the Governor about McCormick's political activities.

On March 24, 1976, at the direction of the Governor's office, White wrote a letter to McCormick expressing his dissatisfaction with reports that McCormick "indulged in criticism of officials connected with the Baton Rouge city government . . . ." White pointed out that "a good harmonious relationship is necessary to the success of our mission," and stated that he hoped "no subsequent action will be necessary." The complaints to the Governor about

McCormick continued, however. On May 11, 1976, again at the direction of the Governor, White handed a letter to McCormick informing him that he was being terminated as a result of his political involvement. On May 18, McCormick and several members of the Planning District met with Governor Edwards to discuss the termination. The Governor expressed a willingness to reinstate McCormick if he would discontinue his political activities, but McCormick refused to do so and the meeting ended quickly.

On September 3, 1976, McCormick filed this suit against Governor Edwards and Wingate White alleging that they terminated McCormick for political reasons in violation of 42 U.S.C. § 1983 and other statutes. On November 3, 1977, an amended complaint was filed adding Mayor Dumas and Representative Delpit as additional defendants, alleging that they conspired with Edwards and White to secure the discharge "solely as a political reprisal for complainant's support of the opposition candidate for mayor in the 1976 election in Baton Rouge." The case was tried in district court without a jury and, on July 19, 1979, the court held that McCormick's discharge was indeed

due to his activities in the mayoralty campaign and was the unlawful product of a conspiracy among the four defendants. The court later held that all four defendants were personally liable for damages, including attorney's fees, in the amount of $63,713.

[1,2] Although there were many issues contested in the district court and several issues presented here on appeal, we find one issue to be controlling: whether a non-civil service state employee, engaged neither in policy-making nor confidential duties, is constitutionally protected from being discharged for becoming actively involved in a partisan election campaign. The district court ruling, the amended complaint and the plaintiff's testimony all demonstrate that McCormick's basic contention is that he was discharged for is involvement in the 1976 Baton Rouge mayoralty campaign. The district court's finding that that involvement was the reason for the discharge is not clearly erroneous. McCormick testified that he gave a party for candidate Breaux and worked for the candidate after working hours. McCormick even acted as a stand-in speaker for Breaux at a public meeting. It is not contested that, as a non-civil service

employee, McCormick serves at the will of his superiors and can be discharged for any legitimate reason or even for no reason at all. However, he cannot be fired for exercising constitutionally protected rights unless some governmental interest outweighs the employee's interest in exercising those rights. Perry v. Sinderman, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); Hastings v. Bonner, 578 F.2d 136 (5th Cir. 1978); Stapp v. Avoyelles Parish School Board, 545 F.2d 527 (5th Cir. 1977). It cannot be denied that McCormick, like all citizens, has a constitutionally protected right to actively support, work for and campaign for a partisan candidate for political office or even to run for such office himself. Elrod v. Burns, 427 U.S. 347, 370-71, 96 S.Ct. 2673, 2688, 49 L.Ed.2d 547 (1976); Lubin v. Panish, 415 U.S. 709, 94 S.Ct. 1315, 39 L.Ed.2d 702 (1974); McBride v. Askew, 541 F.2d 465 (5th Cir. 1976). Thus, on this appeal we must decide whether the State's interest in prohibiting its employees from engaging in such activities outweighs the employee's rights.

THE HISTORY OF REGULATION OF POLITICAL ACTIVITY

There is a long history of conflict in this

country between government employers, themselves most often products of the political system, and employees desiring to fully exercise the political rights of citizens. In 1801, President Thomas Jefferson expressed his concern with the political activities of federal employees:

> The President of the United States has seen with dissatisfaction officers of the General Government taking on various occasions active parts in elections of the public functionaries, whether of the General or of the State governments. Freedom of elections being essential to the mutual independence of governments and of the different branches of the same government, so vitally cherished by most of our constitutions, it is deemed improper for officers depending on the Executive of the Union to attempt to control or influence the free exercise of the elective right . . . . The right of any officer to give his vote at elections as a qualified citizen is not meant to be restrained, nor, however given, shall it have any effect to his prejudice; but it is expected that he will not attempt to influence the votes of others nor take any part in the business of electioneering, that being deemed inconsistent with the spirit of the Constitution and his duties to it.

10 J. Richardson, Messages and Papers of the Presidents 98-99 (1897). Several subsequent presidents issued orders banning partisan political activity by federal employees.[3] The first federal civil service

law, the Pendleton Act of 1883, included prohibitions of coercion of civil servants for political reasons and making, soliciting or assessing political contributions from or by federal employees.[4] In 1907, President Theodore Roosevelt issued an executive order to the effect that federal civil servants, "while retaining the right to vote as they please and to express privately their opinions on political subjects, shall take no part in political management or political campaigns." Exec. Order No. 642 (June 3, 1907).

Finally, in 1939, Congress enacted the Hatch Act, a comprehensive scheme regulating political activity of federal employees.[5] One of the Hatch Act's provisions bars federal employees from "tak[ing] an active part in political management or in political campaigns." 5 U.S.C. § 7324.[6] The state legislatures were equally active in prohibiting the political activity of civil servants, with some states enacting laws considerably earlier than the passage of the Hatch Act.[7] Virtually all states now place at least some restrictions on the political activities of employees.[8] The Louisiana Constitution prohibits

employees in the classified service from taking an "active part in the management of the affairs of a political party, faction, candidate, or any political campaign, except to exercise his right as a citizen to express his opinion privately, to serve as a commissioner or official watcher at the polls, and to cast his vote as he desires."[9] State and federal regulations have been uniformly upheld against constitutional challenges in both state and federal courts.[10]

MCCORMICK'S CLAIM UNDER ELROD AND BRANTI

[3] Notwithstanding this long history of regulation of the political activities of public officers and employees, McCormick argues that his discharge was unconstitutional. In support of this contention, he relies on two recent Supreme Court cases: Elrod v. Burns, supra, and Branti v. Finkel, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980). In Elrod, the petitioners challenged the discharge by the newly-elected Sheriff of Cook County, Illinois, of all non-civil service employees not of the Sheriff's political party. The Court found the practice unconstitutional, holding that a "nonpolicymaking, nonconfidential

government employee can[not] be discharged or threatened with discharge from a job he is satisfactorily performing upon the sole ground of his political beliefs." 427 U.S. at 375, 96 S.Ct. at 2690 (Stewart, J., concurring).[11] In Branti, a closely-divided court held that assistant public defenders in Rockland County, New York, were neither policymaking nor confidential employees and thus could not be replaced merely because they differed in political allegiance from the Public Defender.

McCormick's reliance on Elrod and Branti is misplaced. These cases are clearly limited to situations in which employees are discharged solely because of their political affiliation or beliefs. McCormick does not contend that he was terminated because he is a Republican, a Democrat, or a member of any particular party, or because he held certain political beliefs. He was discharged because of his active participation in the 1976 Baton Rouge mayoralty campaign. Neither Elrod nor Branti deals with a situation similar to the one now before this court.

Moreover, neither Elrod nor Branti overruled United States Civil Service Commission v. National

Association of Letter Carriers, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973), or its companion case, Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). In fact, Elrod explicitly followed Letter Carriers and its predecessor, United Public Workers of America v. Mitchell, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947). Elrod v. Burns, supra, 427 U.S. at 366-71, 96 S.Ct. at 2686-89. Letter Carriers, Mitchell, and Broadrick, rather than Elrod or Branti, control the present case. Letter Carriers upheld the validity of the provisions of the Hatch Act prohibiting federal employees from taking an active part in political campaigns.[12] The Court listed a wide range of political activities which Congress could regulate:

> We unhesitatingly reaffirm the Mitchell holding that Congress had, and has, the power to prevent [federal employees] from holding a party office, working at the polls, and acting as party paymaster for other party workers. An Act of Congress going no farther would in our view unquestionably be valid. So would it be if, in plain and understandable language, the statute forbade activities such as organizing a political party or club; actively participating in fund-raising activities for a partisan candidate or political party; becoming a candidate for, or campaigning for, an elective public office, actively managing the campaign of a partisan candidate for public office; initiating or circulating

a partisan nominating petition or soliciting votes for a partisan candidate for public office; or serving as a delegate, alternate or proxy to a political party convention. Our judgment is that neither the First Amendment nor any other provision of the Constitution invalidates a law barring this kind of partisan political conduct by federal employees.

413 U.S. at 556, 93 S.Ct. at 2886. Broadrick reached the same conclusion for state prohibitions of active political involvement by state and local government workers.[13]. McCormick's activities clearly came within the scope of the "kind of partisan political conduct" found subject to regulation in Letter Carriers. By holding a party for candidate Breaux at his home, McCormick "actively participat[ed] in fund-raising activities for a partisan candidate," and by handing out cards and speaking on Breaux's behalf at a public meeting, McCormick "solicit[ed] votes for a partisan candidate for public office."

Thus, state and federal governments can constitutionally discharge civil service employees for precisely the same activities engaged in by McCormick. It would be an anomaly for us to hold that Governor Edwards and Wingate White could not discharge McCormick, a non-civil servant serving at their will, for engaging in activities for which a civil servant

could be discharged. McCormick's constitutional rights are no broader than those of other government workers. He can be discharged for any reason, even for no reason at all, as long as he is not fired for a constitutionally impermissible reason. Thus, his discharge was not unlawful and the district court erred in ruling to the contrary. We accordingly reverse the district court's judgment in favor of the plaintiff McCormick and render judgment in favor of the defendants.

REVERSED AND RENDERED

SAM D.JOHNSON, Circuit Judge, dissenting:

Plaintiff McCormick was discharged from his position as Program Director of the Capital District Law Enforcement Planning Council. The Governor of Louisiana, defendant Edwards, dismissed McCormick because of the latter's active support of a mayoral candidate in the 1976 Baton Rouge election. The question in this case is whether McCormick's local political activity, which is within the protection of the first amendment, was overridden by a sufficiently important state interest.

For the answer to this question, this Court was presented with two lines of cases. On the one hand, there are Elrod v. Burns, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), and Branti v. Finkel, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980). These hold that government employees cannot be dismissed on the sole ground of political belief or party affiliation unless it is an appropriate requirement for the effective performance of the public office involved. On the other hand, there are United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d. 796 (1973), Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d. 830 (1973), and United Public Workers of America v. Mitchell, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947). These cases uphold statutory prohibitions of partisan political activities by government employees. The majority concludes that McCormick's partisan political conduct falls within the Letter Carriers line of cases, and therefore hold that the discharge for political activism was permissible.

This case, however, does not involve the

application of a statutory or other regulatory prohibition of political activities. Although an employee of the state government, McCormick was not within Louisiana's prohibition of partisan political activities by state employees. See La.Const. art. 10, §§ 2,9 (1974). Broadrick, the companion case to Letter Carriers, upheld similar state prohibitions of active political involvement by state and local government workers. But because there is no generic state prohibition applicable to McCormick in the case at bar, Broadrick is inapposite. Nonetheless, the majority relies on the Letter Carriers line of cases to hold that McCormick's discharge was not for a constitutionally impermissible reason. In so doing, the majority assumes the existence of a fact the district found not to be true. To see how this is so first requires a brief summary of the defendants' argument below.

Defendants' theory of defense was that adequate performance of McCormick's job as liaison between the Louisiana Commission on Law Enforcement and Administration of Criminal Justice and various local law enforcement agencies required that McCormick remain politically neutral. Defendants claimed that

McCormick's political activities prevented him from maintaining cordial and harmonious relationships with the local officials. In other words, defendants assert that McCormick was in effect dismissed for cause, and not solely for the exercise of first amendment rights, because the exercise of those rights made McCormick's job performance allegedly unsatisfactory.

Such a defense properly states the law. The first amendment protects political association -- including partisan political activities by government employees -- as well as political expression. Buckley v. Valeo, 424 U.S. 1, 15, 96 S.Ct. 612, 632, 46 L.Ed.2d 659 (1976); Mitchell, 330 U.S. at 94-95, 67 S.Ct. at 566-567. Since involvement in partisan politics lies close to the core of the first amendment, the exercise of these rights can only be overridden on a showing of a sufficiently important governmental interest. Letter Carriers, 413 U.S. at 564, 93 S.Ct. at 2889. In the Letter Carriers and Broadrick cases, the statutory prohibition against the exercise of these rights was justified on a proper showing of the interest in the efficient, fair, effective, and impartial administration of the executive branch of

the government. One of the factors in the Court's balancing of the government's interest in efficient public service and the employee's interest as a citizen was that the political activity restrictions there were not aimed at particular parties, groups, or points of view, but applied even-handedly to all covered partisan conduct, and did not seek to control political opinions or beliefs or interfere with the right to vote. Letter Carriers, 413 U.S. at 564, 93 S.Ct. at 2889.

Since there was no generic prohibition of McCormick's political activities, the analysis must proceed case-by-case in determining whether the dismissal was justified because these activities are demonstrably incompatible with the discharge of the employee's public duties. Although the defendants alleged such an incompatibility, the district court found as a fact that McCormick was discharged solely for his political activities, and not because of any poor job performance. This finding of fact was based on the testimony of many witnesses, including local officials who did not find McCormick's political activism to have affected his working relationship

with them. This and other testimony overwhelmingly demonstrated that McCormick was doing not just a satisfactory job, but an exemplary job. Defendant White in fact testified that McCormick had been doing satisfactory work and was fired for solely political reasons. The only testimony to the contrary was that of some of the other defendants.

Findings of fact, of course, cannot be set aside unless clearly erroneous. Fed.R.Civ.Pro. 52(a). Due regard is to be given to the trial court's opportunity to judge the credibility of witnesses. Id. Indeed, the appellate court must be especially reluctant to set aside a finding based on the trial judge's evaluation of conflicting oral testimony. 9 C. Wright & A. Miller, Federal Practice & Procedure § 2586, at 737 (1971); Matter of Multiponics, Inc., 622 F.2d 709, 723 (5th Cir. 1980). The majority recognizes the district court finding that McCormick's discharge was motivated solely by political pressures, and holds that this finding is not clearly erroneous. The majority fails to recognize, however, the district court's finding that McCormick's political activities did not impair his ability to effectively and fairly discharge his

public office. Before the majority can reach the legal issue of whether the governmental interest in effective public service outweighs McCormick's right to engage in partisan political activities, it must first deal with the factual issue of whether such a governmental interest existed in this particular case. After reviewing the record, this writer is not left with a "definite and firm conviction" that the district court erred in its conclusion. United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 541, 92 L.Ed. 746 (1948). I accordingly dissent.

Footnotes

[1] The other appellants are Wingate White, Executive Director of the Louisiana Commission on Law Enforcement and Administration of Justice, Woodrow W. Dumas, Mayor of Baton Rouge, and Joseph Delpit, Louisiana State Representative.

[2] In 1979, as part of a major revision of the statutes dealing with LEAA, Section 3723 was repealed and replaced by an unrelated provision. Much of the content of previous Section 3723 is now incorporated in other sections. See, e.g., 42 U.S.C. § 3742. McCormick was terminated in 1976, so we refer to the repealed law.

[3] See H. Kaplan, The Law of Civil Service 17-18 (1958); Friedman & Klinger, The Hatch Act: Regulation of Administrative Action of Political Activities by Governmental Employees, 7 Fed. B.J. 5, 6-8 (1945); Vaughn, Restrictions on the Political Activities of Public Employees: The Hatch Act and Beyond, 44 Geo.Wash.L.Rev. 516, 516-518 (1976).

[4] 22 Stat. 403, 404, 406-07 (1883).

[5] 53 Stat. 1147, 1148 (1939). The Hatch Act, as amended, is somewhat scattered in the United States Code.

[6] 5 U.S.C. § 7324 reads as follows:

(a) An employee in an Executive agency or an individual employed by the government of the District of Columbia may not —

(1) use his official authority or influence for the purpose of interfering with or affecting the result of an election; or

(2) take an active part in political management or in political campaigns.

For the purpose of this subsection, the phrase "an active part in political management or in political campaigns" means those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President.

(b) An employee or individual to whom subsection (a) of this section applies retains the right to vote as he chooses and to express his opinion on political subjects and candidates.

(c) Subsection (a) of this section does not apply to an individual employed by an educational or research institution, establishment, agency, or system which is supported in whole or in part by the District of Columbia or by a recognized religious, philanthropic, or cultural organization.

(d) Subsection (a)(2) of this section does not apply to —

(1) an employee paid from the appropriation for the office of the President;

(2) the head or the assistant head of an Executive department or military department;
(3) an employee appointed by the President, by and with the advice and consent of the Senate, who determines policies to be pursued by the United States in its relations with foreign powers or in the nationwide administration of Federal laws;
(4) the Mayor of the District of Columbia, the members of the Council of the District of Columbia, or the Chairman of the Council of the District of Columbia, as established by the District of Columbia Self-Government and Governmental Reorganization Act; or
(5) the Recorder of Deeds of the District of Columbia.

[7] See, e.g., statutes discussed in Commonwealth v. McCarthy, 281 Mass. 253, 183 N.E. 495 (1932); Stowe v. Ryan, 135 Or. 371, 296 P. 857 (1931); Sarlls v. State, 201 Ind. 88, 166 N.E. 270 (1929); Duffy v. Cooke, 239 Pa. 427, 86 A. 1076 (1913).

[8] A list of state statutes is found in Broadrick v. Oklahoma, 413 U.S. 601, 604 n.2, 93 S.Ct. 2908, 2912 n.2, 37 L.Ed.2d 830 (1975).

[9] La.Const. Art. 10, § 9. The provision in its entirety reads as follows:

§ 9. Prohibitions Against Political Activities

Section 9. (A) Party Membership; Elections. No member of a civil service commission and no officer or employee in the classified service shall participate or engage in political activity; be a candidate for nomination or election to public office except to seek election as the classified state employee serving on the State Civil Service Commission; or be a member of any national, state, or local committee of a political party of faction; make or solicit contributions for any political party, faction, or candidate; or take active part in the management of the affairs of a political party, faction, candidate, or any political campaign, except to exercise his right as a citizen to express his opinion privately, to serve as a commissioner

or official watcher at the polls, and to cast his vote as he desires.

(B) Contributions. No person shall solicit contributions for political purposes from any classified employee or official or use or attempt to use his position in the state or city service to punish or coerce the political action of a classified employee.

(C) Political Activity Defined. As used in this Part, "political activity" means an effort to support or oppose the election of a candidate for political office or to support a particular political party in an election. The support of issues involving bonded indebtedness, tax referenda, or constitutional amendments shall not be prohibited.

[10] See, e.g., United States Civil Service Commission v. National Associastion of Letter Carriers, AFL-CIO, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1975); Broadrick v. Oklahoma, supra; United Public Workers of America v. Mitchell, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947); Ricks v. Department of State Civil Service, 200 La. 341, 8 So.2d 49, 58-59 (1942). In one of the earliest cases upholding a discharge of a public employee who displeased his superior by engaging in political activities, Justice Holmes, then of the Supreme Judicial Court of Massachusetts, held that a mayor could lawfully discharge a politically active policeman. In a now familiar line, Justice Holmes put the matter succintly: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." McAuliffe v. City of New Bedford, 155 Mass. 216, 29 N.E. 517, 517 (1892).

[11] There was no opinion for the Court in Elrod. The plurality opinion, written by Justice Brennan, with Justices White and Marshall concurring, reached its conclusion on broader grounds than the opinion of Justice Stewart, with whom Justice Blackmun joined. Justice Stevens took no part in the case; the remaining three justices dissented. In a case like this

one, where no opinion commands a majority, "the holding of the Court may be viewed as that position taken by those members who concurred in the judgment on the narrowest grounds . . . ." Gregg v. Georgia, 428 U.S. 153, 169 n.15, 96 S.Ct. 2909, 2923 n.15, 49 L.Ed.2d 859 (1976). Thus the opinion of Justice Stewart states the holding of the Court.

[12] The portion of the Hatch Act challenged in Letter Carriers is set out in note 5, supra.

[13] In Letter Carriers, the plaintiff union challenged the Hatch Act provisions on substantive grounds and also claimed that the law was unconstitutionally vague and overbroad. 413 U.S. at 551-54, 93 S.Ct. at 2883-85. The Broadrick appellants conceded the substantive validity of the state statute but claimed that it too was vague and overbroad. 413 U.S. at 606-07, 93 S.Ct. at 2913. The substantive validity of the Hatch Act provisions was previously upheld in United Public Workers of America v. Mitchell, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947).

APPENDIX B

R. C. MCCORMICK

VS.

EDWIN EDWARDS, INDIVIDUALLY AND AS GOVERNOR OF LOUISIANA, AND WINGATE M. WHITE, INDIVIDUALLY AND AS EXECUTIVE DIRECTOR OF THE LOUISIANA COMMISSION ON LAW ENFORCEMENT & ADMINISTRATION OF CRIMINAL JUSTICE

CIV. A. NO. 76-272-A.

United States District Court,
M. D. Louisiana.

Sept. 26, 1979

Plaintiff brought civil rights action, claiming that he had been fired from his position as district director for district law enforcement planning council for purely political reasons and that the defendants had conspired to bring about his discharge. The District Court, E. Gordon West, Chief Judge, held that: (1) mayor and former member of the city parish council were individually liable; (2) Governor and Executive Director of Louisiana Commission on Law Enforcement and Administration of Criminal Justice were individually liable and were not entitled to good faith defense; and (3) plaintiff was entitled to a total damages award of $63,713, consisting of $28,713 net earnings loss, $20,000 for other injuries, and award of attorney fees of $15,000.

Ordered accordingly.

E. GORDON WEST, Chief Judge:

Plaintiff, R. C. McCormick, was employed by the State of Louisiana as District Director for the Capital District Law Enforcement Planning Council, which is a part of a federally funded program. His immediate superior was the defendant, Col. Wingate M. White, Executive Director of the Louisiana Commission on Law Enforcement and Administration of Criminal Justice. Col. White had the exclusive authority to hire and fire persons to hold or holding the position occupied by the plaintiff, but as the evidence clearly showed, as a practical matter, the hiring and/or firing was done only after consultation with and with the consent of or at the direction of the defendant, Edwin W. Edwards, Governor of the State of Louisiana. The other two defendants, Woodrow W. Dumas, Mayor of the City of Baton Rouge, and Joseph A. Delpit, formerly a member of the City-Parish Council of Baton Rouge and later a State Representative, had no authority or power in their official capacity to hire or fire a person holding the position held by the plaintiff.

Plaintiff filed this suit claiming that he had been fired from his job for purely political reasons and that the four named defendants had conspired to bring about his discharge. He alleged that he was neither in a policy-making position nor in a position involving a confidential relationship with a policy-maker as defined in Elrod v. Burns, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). He alleges that he was discharged for purely political reasons in violation of his First and Fourteenth Amendment rights, and in violation of his civil rights as protected by Title 42, U.S.C. §§ 1981, 1983, 1985, 1986 and 1988. After trial of this case, the Court, for oral reasons assigned and now a part of this record, found that all four defendants did conspire to and were part of a scheme to deprive the plaintiff of his federally protected rights, and indeed did in fact deprive him of those rights, and that therefore plaintiff is entitled to recover damages therefor from the defendants. The Court specifically found that the plaintiff was neither a "policy-maker," nor a "confidential employee" as those terms are used in Elrod. See also Stegmaier, et al, v. Trammell, et al, 597 F.2d 1027

(CA 5-1979).

The matter is now before the Court for a determination of damages.

[1] The first question that must be resolved is whether the defendants are liable in their individual capacity or only in their official capacity. As far as W. W. Dumas and Joseph A. Delpit are concerned, there is simply no question but that they are liable as individuals and not as public officials. Neither of those defendants had any official obligation or duty connected with the hiring or firing of the plaintiff. Whatever their involvement, it was on a deliberately voluntary basis, and in no way connected with any official duties. The evidence in the case left absolutely no doubt whatsoever that the influence exerted by those two defendants on the Governor was purely political and was in furtherance of what had apparently developed as a political feud between those defendants and the plaintiff. Their involvement in the firing of the plaintiff is spelled out in the Court's prior reasons for judgment. Their actions were voluntary, deliberate and purely personal in nature. They were in no way connected with the public

weal. Their actions which the Court has previously held played a substantial part in causing the plaintiff to be discharged from his job were unofficial, personal actions taken in violation of plaintiff's federally protected rights, and for which the defendants, W. W. Dumas and Joseph A. Delpit, are personally liable to the plaintiff.

[2] We turn now to the question of whether or not Col. White and Governor Edwards are protected by immunity from suit for what they contend were official acts. There is no doubt but that Col. White had the authority, under certain circumstances, to fire the plaintiff, and in all probability the Governor had an official right, under certain circumstances, to fire the plaintiff or cause him to be fired. But the question here is whether or not, under the circumstances of this case, either Col. White or Governor Edwards, or both, acted outside the scope of their authority when they caused the plaintiff to be fired for purely political reasons.

The question of whether or not the defendants acted in their official character is therefore material here for the purpose of determining whether they

are shielded from liability for the wrongful acts which they have been found to have committed. Those defendants can be found to be shielded from liability if the acts which have been proved were committed within the scope of their official duties as provided by State law, and within the boundaries set for such State-granted immunity by the Supreme Court of the United States in the case of Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974).

The immunity provided by the State of Louisiana for the protection of its officers when acting within the scope of their official duty has always been narrowly interpreted by the Courts of this State. In Strahan v. Fussell, 218 La. 682, 50 So.2d 805 (1951), the Louisiana Supreme Court quoted with approval from the earlier case of Thibodaux v. Town of Thibodaux, 46 La.Ann. 1528, 16 So. 450, where it said:

> "Officials, in the performance of a duty imposed by law, cannot be held in damages for acts done strictly within the lines of official duty." (Emphasis added.)

The Court, in Strahan, further said:

> "The defendant is entitled to the immunity from suit of a public official only so long as he acts honestly and in good faith, and

> within the scope of his authority. If he acts outside of his strict authority, he breaches the condition of his immunity and is liable to a civil action for damages to persons harmed by his improper conduct." (Citations omitted).

In Strahan, the Court held that a member of the Police Jury of Washington Parish was not entitled to immunity where a suit was brought against him for negligent maintenance of a public bridge in his ward, even though maintenance of the public roads was the clear responsibility of the Police Jury, where that body had improperly delegated its authority to its individual members, whose acts and omissions in regard to the maintenance of the roads were thereafter considered to be outside of the scope of their official duty. So hostile, indeed, have the Courts of Lousiana been to the idea that public officials may be immune from liability for performing the same act that would result in an assessment of damages against a private person, that in the area of the immunity of a law enforcement officer, the area naturally most frequently litigated, the immunity has been reduced to an insignificant thing. Professor Ferdinand Stone, in his treatise on Louisiana torts, writes:

> "Where a sheriff lays hands upon and arrests an individual in the course of his duty and with proper warrant, such conduct may well be privileged. But if he exceeds this privilege as was the case in Dufrene v. Rodrigue, 38 So.2d 511 (La.App.1949), where the deputy sheriff struck a prisoner under his charge when there was no need for it, the sheriff was held liable for the abuse of his authority. The borderline between necessary and unnecessary force is not always so easy to draw as in the aforementioned case and depends upon the facts of each case." Stone, Louisiana Civil Law Treatise, Tort Doctrine, Section 140.

Public officials are clothed with authority to act in the public interest. To enable them to so act, they are given broad powers, the higher the official, the broader his power. Here, the defendants, Edwards and White, had, under certain circumstances, the power to effect the dismissal of the plaintiff. But it is the judgment of this Court that they had no right to do so for purely personal and political reasons, and in clear violation of the plaintiff's federally protected rights. When they so acted, they acted beyond the scope of their official duty, and in accordance with the law of the State of Louisiana, whose officers they were, they were not protected by any privilege or immunity from suit. We are cognizant of the fact that in Scheuer v. Rhodes, supra, the Supreme Court made

reference to what it termed a "qualified immunity" available under certain circumstances to officers of the executive branch of government:

> " . . . a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct." Scheuer v. Rhodes, at p. 1692.

But we hold here that the defendants, White and Edwards, did not act in the good faith belief that they had the right to do what they did, as the term "good faith" has been interpreted by the Supreme Court of the United States, and that therefore, their acts fall outside the limit set upon the power of the states to immunize their officers from personal liability under the Civil Rights Act.

After publication of the decision in the Scheuer case, it was somewhat unclear as to whether the qualified immunity therein described covered all acts

subjectively believed by the official to be proper or whether an objective standard was meant to apply. The Supreme Court clarified this issue in the later case of Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975). In that case the Court said:

> "The disagreement between the Court of Appeals and the District Court over the immunity standard in this case has been put in terms of an 'objective' versus a 'subjective' test of good faith. As we see it, the appropriate standard necessarily contains elements of both. The official himself must be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice. To be entitled to a special exemption from the categorical remedial language of § 1983 in a case in which his action violated a student's constitutional rights, a school board member, who has voluntarily undertaken the task of supervising the operation of the school and the activities of the students, must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges. Such a standard imposes neither an unfair burden upon a person assuming a responsible public office requiring a high degree of intelligence and judgment for the proper fulfillment of its duties, nor an unwarranted burden in light of the value which civil rights have in our legal system. Any lesser standard would

> deny much of the promise of § 1983. Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. That is not to say that school board members are 'charged with predicting the future course of constitutional law.' Pierson v. Ray, 386 U.S. [547] at 557, 87 S.Ct. [1213] at 1219 [18 L.Ed.2d 288]. A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith." Strickland, at pp. 1000-1001.

The defendants claim that at the time they effected the discharge of the plaintiff, they believed they had the authority to do it, and that they believed, in good faith, that the Elrod prohibition did not apply in this particular case. The test laid down in Wood v. Strickland, supra, has been again discussed by the Supreme Court in the recent case of Procunier v. Navarette, 434 U.S. 555, 98 S.Ct. 855, 55 L.Ed.2d 24 (1978), involving the scope of immunity of California State Prision officials accused of wrongful

interference with a prisoner's outgoing mail. There it was held that the defendants were entitled to immunity because there was no clear cut established right protecting prisoner correspondence at the time the acts were alleged to have occurred.

> "Whether the state of the law is evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court, there was no 'clearly established' First and Fourteenth Amendment right with respect to the correspondence of convicted prisoners in 1971-1972. As a matter of law, therefore, there was no basis for rejecting the immunity defense on the ground that petitioners knew or should have known that their alleged conduct violated a constitutional right. Because they could not reasonably have been expected to be aware of a constitutional right that had not yet been declared petitioners did not act with such disregard for the established law that their conduct 'cannot reasonably be characterized as in good faith.' Wood v. Strickland, supra, 420 U.S., at 322, 95 S.Ct., at 1001." Procunier v. Navarette, supra, at 861-862.

[3] As the Court conceives its duty in this case, therefore, we must determine whether the defendants, White and Edwards, could have believed in good faith that they were acting within the law when they brought about the discharge from employment of the plaintiff. In making our determination of good faith, or lack

thereof, we cannot allow the defendants to rest upon their purely subjective impressions and to plead ignorance of clearly established constitutional rights. The defendants contend that since the case of Elrod v. Burns, supra, which established the right of officials to dismiss policymaking or confidential government employees for purely political reasons, was not decided until one month after the events giving rise to this suit, that therefore the defendants cannot be held to know that their contemplated act was legally wrongful. Their argument is two-fold. They say that:

1. Prior to Elrod it would have been reasonable to believe that any government employee could be dismissed for purely political reasons.
2. Since Elrod, it is not absolutely clear that one occupying a position such as Mr. McCormick's could not be found to come within the exception permitting political dismissals of policymakers.

Each of these contentions must be rejected.

The Elrod case did not establish a brand new prohibition in the law against depriving people of their jobs for purely political reasons. The case was

most remarkable for the exception it created, permitting the dismissal of a very narrowly defined class of persons for otherwise impermissible reasons. Strong language in numerous cases decided before Elrod indicated that conditions relating to political affiliation or belief could never be placed upon public employment. The defendants must be charged with knowledge of those well established principles. The marshalling of cases by the Elrod court itself best illustrates this fact. The principles contained in the cases cited in Elrod, dating as far back as 1943, clearly show the illegality of the acts with which the defendants herein are charged, and they clearly establish that those principles have been established for a long time. The Elrod Court, in marshalling supporting, well established principles, and citing cases in support thereof, said:

> " . . . political belief and association constitute the core of those activities protected by the First Amendment. Regardless of the nature of the inducement, whether it be by the denial of public employment or, as in Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), by the influence of a teacher over students, '[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what

shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.' Id., 319 U.S., at 642, 63 S.Ct., at 1187. And, though freedom of belief is central, '[t]he First Amendment protects political association as well as political expression.' Buckley v. Valeo, supra, 424 U.S. [1] at 11, 96 S.Ct. [612] at 632 [46 L.Ed.2d 659]. 'There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of "orderly group activity" protected by the First and Fourteenth Amendments. NAACP v. Button, 371 U.S. 415, 430, 83 S.Ct. 328, 336, 9 L.Ed.2d 405; Bates v. Little Rock, 361 U.S. 516, 522-523, 80 S.Ct. 412, 416-417, 4 L.Ed.2d 480; NAACP v. Alabama, 357 U.S. 449, 460-461, 78 S.Ct. 1163, 1171, 2 L.Ed.2d 1488. The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom.' Kusper v. Pontikes, 414 U.S. 51, 56-57, 94 S.Ct. 303, 307, 38 L.Ed.2d 260 (1973).

"Particularly pertinent to the constitutionality of the practice of patronage dismissals are Keyishian v. Board of Regents, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967), and Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). In Keyishian, the Court invalidated New York statutes barring employment merely on the basis of membership in 'subversive' organizations. Keyishian squarely held that political association alone could not, consistently with the First Amendment, constitute an adequate ground for denying public employment. In Perry, the Court broadly rejected the validity of limitations on First Amendment rights as a condition to the receipt of a governmental benefit, stating that the government 'may not deny a benefit to a person on a basis that infringes his

constitutionally protected interests -- especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' Speiser v. Randall, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460. Such interference with constitutional rights is impermissible. 408 U.S., at 597, 92 S.Ct., at 2697.

"Patronage practice falls squarely within the prohibitions of Keyishian and Perry. Under that practice, public employees hold their jobs on the condition that they provide, in some acceptable manner, support for the favored political party. The threat of dismissal for failure to provide that support unquestionably inhibits protected belief and association, and dismissal for failure to provide support only penalizes its exercise. The belief and association which government may not ordain directly are achieved by indirection. And regardless of how evenhandedly these restraints may operate in the long run, after political office had changed hands several times, protected interests are still infringed and this the violation remains." Elrod v. Burns, 96 S.Ct. 2673 (1976), at 2181-3.

As long ago as 1969, the Court of Appeals of our own Fifth Circuit said that the contention that there was no right to public employment which would support an action for wrongful deprivation of the same "has for over a decade been rejected time and time again."

Pred v. Board of Public Instruc. of Dade County, 415 F.2d 851 (CA 5-1969), citing Keyishian, above, and numerous other decisions. We therefore hold that the right not to be discriminated against in public employment on the basis of the exercise of the first amendment rights of freedom of speech and freedom of association has been clearly established in this Circuit for at least twenty years, precluding any claim of good faith on the part of the defendants based on ignorance of that right.

Furthermore, if there be any doubt of the clarity of the constitutional pronouncements on this subject, there can be little doubt of the clarity of Louisiana's statutory provision:

> No . . . employer shall adopt or enforce any rule, regulation, or policy which will control, direct, or tend to control or direct the political activities or affiliations of his employees, nor coerce or influence, or attempt to coerce or influence any of his employees by means of threats of discharge or of loss of employment in case such employees should support or become affiliated with any particular political faction or organization, or participate in political activities of any nature or character. L.S.A.-R.S. 23:961

Since neither of the parties to this suit has argued the applicability of this statute and since no

court has apparently ever cited or construed it since its passage in 1938, we are reluctant to hold that it would have supported a state suit for the same damages here granted, but its existence seems to us the last nail in the coffin of the defendants' claim of good faith belief in the lawfulness of their acts.

[4] We now turn to the argument that the defendants could have believed, in good faith, that the position occupied by the plaintiff was subject to patronage dismissal under the Elrod test. Initially, it weighs against this argument that the Court has found it was not. Reasonable men might differ with the Court, but what weighs most heavily against the argument here proffered is the narrowness of the exception drawn by the Elrod case. " . . . the burden of establishing this justification as to any particular respondent will rest on the petitioners on remand, cases of doubt being resolved in favor of the particular respondent." Elrod at p. 2687. It therefore rests with one who would dismiss another from his public job for political reasons, to demonstrate that the affected job is one involving policymaking or a confidential relationship beyond doubt. That, the

defendants in this case clearly failed to do.

To state our holding briefly, we find that the defendants, Edwards and White, are personally liable for the wrongful act they committed when they discharged the plaintiff from his employment, or caused him to be discharged from his employment, and that they may not claim the shield of official immunity, both because, under the circumstances of this case, the act proved lay outside the scope of their official duty, and because they cannot have been in constitutional good faith in believing that they had a right to do that act.

Since we have concluded that the plaintiff is entitled to recover damages for improper termination of his employment, and that all four defendants are individually and collectively liable therefor, we must now address the question of quantum.

[5] Plaintiff has shown that at the time of his discharge he was earning $1,475.00 per month. His successor in office has received several pay increases, which we assume, and there being no evidence to the contrary, plaintiff would also have received had he retained the position. We find that the

plaintiff's lost wages amount to $62,975.00, as a direct result of his illegal termination. The evidence shows that since his termination the plaintiff has earned the sum of $34,262.00 in other employment. This amount must be subtracted from the amount of earnings lost as a result of the termination, leaving a net loss of earnings of $28,713.00.

Plaintiff is a family man, with a good reputation in the community, and who, because of the violation of his constitutional rights, was left suddenly without income to meet his obligations. He had to search for a new job, and had to live for the three years during which this litigation has been pending, on a substantially reduced income. This has been attended with all the usual anxieties about how to pay bills, along with the embarrassment that goes with a public dismissal. Calculation of the exact amount of such damages is necessarily unscientific and inexact, but we think that $20,000.00 is not excessive under the circumstances of this case. See Baskin v. Parker, 602 F.2d 1205, 1209 (CA 5-1979).

[6,7] Plaintiff also seeks to recover attorney fees involved in this litigation. The two attorneys

for the plaintiff aver that they have spent nearly 600 hours working on this case. They make no more precise estimation than that, nor do they offer any breakdown of the time spent by each attorney or of the time spent on each phase or aspect of the case. They ask an award of $30,000.00, which would amount to $50.00 per hour for 600 hours. The Court notes that the record in this case is not voluminous. Approximately 55 documents were filed. Three depositions were taken, at a total expenditure of time of approximately 10 hours. The trial took less than 2 full days, so that an estimation of 32 hours trial time for both attorneys together is, we believe, very liberal. There was very little discovery involved, and most of the facts upon which liability was ultimately found were admitted by the defendants from the beginning. Primarily it was questions of law that were in dispute, and the law necessary to a decision was largely contained in the Elrod case which has been discussed hereinabove, in which the Supreme Court analyzed and practically laid to rest the main points at issue in this case. It is difficult for the Court to believe that two competent attorneys could have labored full

time for nearly two months on this case. The law providing for computation of attorney fees in this case is laid down in Rainey v. Jackson State College, 551 F.2d 672 (CA 5-1977) as follows. Relevant considerations are:

1. the time and labor required,
2. the skill requisite to properly perform the legal services,
3. preclusion of other employment by the attorneys due to acceptance of the case,
4. the novelty and difficulty of the questions presented,
5. the customary fee,
6. whether the fee is fixed or contingent,
7. time limitations imposed by the client,
8. the amount involved and the results obtained,
9. the experience, reputation and ability of the attorneys,
10. the undesirability of the case,
11. the nature and length of the professional relationship with the client,
12. awards in similar cases.

The only one of the above considerations which

would merit a higher than usual fee in this case is No. 10. Undoubtedly many attorneys would hesitate to take a case against such influential public officials as the State Governor, a Mayor, and a State Legislator. See Rainey, supra, at p. 677. For this reason, and noting our doubts about the total time actually spent, of necessity, by the attorneys involved, we think that an award of $15,000.00 in attorney fees would be fair and proper in this case. This will compensate the two attorneys, combined, at a rate of $50.00 per hour, which is a reasonable, going rate for a total time of 300 hours. While this figure is necessarily arbitrary, it is the opinion of this Court that it represents a fair fee for the work involved in this case and the results obtained.

[8] Lastly, plaintiff seeks a judgment which would, at a future date, reinstate him in his prior job. He prays for what he terms "prospective reinstatement." Since he is presently engaged full time in running for the elective office of Sheriff of the Parish of East Baton Rouge, he requests that he be reinstated effective at the conclusion of the sheriff's race. He apparently anticipates losing the

race. Such a remedy is completely unwarranted. Had the plaintiff been unmolested in his job, it would have been necessary for him to resign in order to run full time for the position of sheriff. Had he done so, he most likely would have been replaced during his absence. Whether or not he would have been reinstated in his job if he lost the race for sheriff is entirely too speculative to form the basis of a claim for reinstatement. His claim for that relief must be denied.

We therefore find that the plaintiff suffered damages in the total sum of $63,713.00, including attorney fees, as a result of his unlawful termination from employment, and that the four named defendants, W. W. Dumas, Edwin W. Edwards, Wingate M. White, and Joseph A. Delpit, individually and in solido, are liable to the plaintiff for that amount, together with interest and costs as provided by law. Judgment will be entered accordingly.

APPENDIX C

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

R. C. McCORMICK

VS.

EDWIN W. EDWARDS, ET ALS.

CIVIL ACTION

Number 76-272

Transcript of Ruling of the Court from the Bench given in Open Court on Tuesday, June 19, 1979, at Baton Rouge, Louisiana, by the Honorable E. Gordon West, United States District Judge, presiding.

THE COURT:

Gentlemen, I'm ready to rule on a portion of this case.

Just for the background material and incidentally these comments will constitute my findings of fact and conclusions of law insofar as this decision goes, reserving the right to

the Court, however, to change them as to form but not as to substance if it is deemed advisable to do so; in all probability I will not, but I do reserve the right to do it if for appellate reasons it might be required.

In this case, the plaintiff, R. C. McCormick, was apparently employed in the position known as the District Program Director for the Capital District Law Enforcement Planning Council. His immediate supervisor in that job was Colonel Wingate White. As the evidence shows, Colonel White had the exclusive authority to hire and fire persons occupying this office; but as a practical matter, the hiring and firing for that job was done only after consultation with and with the consent of the Governor of the State of Louisiana.

The thing that brought about this lawsuit was a letter dated May 11, 1976, directed by Colonel Wingate White to the plaintiff, Mr. McCormick, which stated, and I quote, "Your involvement in the last political election has created a situation which is detrimental to the well-being of the Louisiana Commission of Law Enforcement. I am therefore placing you on annual leave immediately, and your employment will be terminated effective at the close of business the final day of your allowable annual leave, which will be May 24, 1976. Sincerely yours, Wingate M. White, Executive Director."

After the plaintiff was thus discharged from his job, this suit was filed, claiming this was a violation of his First and Fourteenth Amendment rights, being discharged from this job because of political activities.

Now, much testimony has been taken over the last day and a half in this case. Colonel White testified that he held the position of Executive Director of the Louisiana Commission on Law Enforcement, and he was in fact the direct superior of the plaintiff, Mr. McCormick.

Colonel White admitted, of course, as he must, having written the letter from which I've just read, and admitted that the reasons stated in the letter were that Mr. McCormick was fired because he did political activities in what he referred to as "a recent political campaign."

Colonel White testified without any equivocation that he knew of no reason other than politics for discharging plaintiff. Colonel White testified that he terminated the employment of the plaintiff under

direct orders from Governor Edwards, and that as far as he knew, those orders were based entirely upon political considerations.

The Court asked Colonel White if there was any other reason such an inadequacy of performance in his work or anything of that nature, and Colonel White responded positively that to his knowledge there was no such reason; that the total reason was political activity, and then Colonel White said that he -- quote -- "works for the Governor, and I do what he tells me to do."

Now, the question of whether or not the discharge of an employee in the position held by the plaintiff is permissible for political reasons depends primarily upon whether the person holding that job is considered to be in a policymaking position, or what is referred to as a confidential

employee. The testimony in this case leads to the inevitable conclusion that Mr. McCormick was neither a policy maker in his job nor was he a confidential employee. Indeed, the only evidence introduced in this trial pertaining to the question of the handling of confidential matters, came from a person who held a similar job in another area, in another district, who testified, as I recall it, that on one occasion only, he had access to some confidential matters in connection with a grant being applied for. There is no evidence in this case to indicate in any way that Mr. McCormick was a confidential employee with access to confidential material; and, as a matter of fact, he testified that he was not, and that testimony is not refuted.

There is simply no credible testimony of any kind in this record to indicate that this plaintiff was in anyway

a policy maker. Now, the Courts have held, particularly in the case of Finkel versus Branti, found at 457 F. Supp. 1284, a 1978 case, that the mere fact that a person or an employee has responsibility does not make him a policymaker. And that case further held that any doubt that exists in that determination must be resolved in favor of plaintiff.

While Colonel White at first testified that in his opinion, the plaintiff did have some authority to make policy, when later questioned he clarified that statement by simply saying that that was based upon the fact that the plaintiff ran his office without supervision. But that has nothing to do with the question of policy-making insofar as the mission of this agency is concerned. It is evident, abundantly evident, from the evidence in this case that the policies

are made at the state level and by the Board of Directors or the Council or whatever it may be referred to as. It was suggested by one of the witnesses who testified, who was an attorney for LEAA, that this she thought was a policy-making position because the plaintiff had input into policy-making. There is a tremendous difference between being able to suggest, recommend, or have input, and in being the policy-maker.

Everyone in this case has testified that the Director, that is the job held by this plaintiff, did not have the authority to initiate policy; nor did he have any authority whatsoever to set policy aside or deviate from policy. He had the right, and indeed, the obligation and duty I would assume to recommend to the proper authorities that certain policies be instituted, but whether or not those policies were instituted or

other policies eliminated, were not within the ambit of his authority, but were entirely within the ambit of those above him on the Council or the Board of Directors at the state level. While he had the responsibility for running his office, that has nothing to do with the policymaking insofar as the agency was concerned.

The case of Elrod versus Burns, of course, which is the landmark case, found at 96 Sup. Ct. 2673, decided in 1976, establishing the principle beyond any doubt that discharging a government employee who is satisfactorily performing his job solely because of political belief, is clearly a violation of First and Fourteenth Amendment rights, and consequently becomes a violation of Title 42, USC § 1983, a violation over which the Federal Court, of course, has jurisdiction.

The Court in Elrod made it clear that pure patronage dismissals are limited to policy-making positions; in other words, politicians or elected officials have the right to discharge people who are there by pure patronage if that position is one which determines policy and which is required to be filled by members sympathetic with the elected official.

The Court stated in that case that reserving that right to discharge, or execute patronage dismissals of policymaking positions is sufficient to effectively protect an administration in the carrying out of its mandate from the electorate. It has been suggested by some witnesses in this case that because of the fact that the plaintiff had input by way of right to suggest the creation of or the elimination

of policy matters, that his suggestions carried great weight, and thus this input amounted to a policy-making position; but, of course, the mere fact that suggestions carry great weight does not make the suggestor a policy-maker. As a matter of fact, I think it would be rather disastrous to keep a person in a non-policy-making job whose opinions and recommendations were given no weight.

It is evident from this record that practically everyone, with the exceptions that I will comment on in a moment, agreed that the plaintiff was not only doing a satisfactory job, he was doing what Wingate White referred to as an exemplary job. Now, White said he did a good job, had no complaints, had no reason to terminate him other than

orders from the Governor.

About fifteen members on this Board of Directors, after the letter of termination was received, met and attended a meeting at the Mansion, I believe, where they recommended that the Governor change his mind in this dishcarge; and they all certified to the fact that the plaintiff was doing a satisfactory job. Of the people with whom the plaintiff actually dealt, there really seems to be only one area where there was some unhappiness with the plaintiff's performance; and I might add that that unhappiness seemed, according to the evidence, to have been resolved.

Chief of Police, Howard Kidder, apparently had a problem -- at least he though he had a problem -- in his department in connection with one

particular grant that department wanted, and it was suggested, according to the testimony, that the plaintiff confer with Chief Kidder and try to resolve those differences. Both Colonel White and Governor Edwards, and also the plaintiff, and Chief Kidder himself, testified that after a meeting that those differences were, in fact, resolved; and the program referred to was ultimately this case that the reason for the two year delay or whatever it was in connection with that particular program was caused by problems in the application which, incidentally, was not completed or made by the director, because it was not only not his job to make the application, but it was against the resolution of the Council for him to

make those applications, and the list of non-compliance items that came down from the State and not from Mr. McCormick was rather lengthy and reflected on the lack of knowledge of the persons in the police department who attempted to apply for the grant in question.

It is interesting to note that Colonel White testified that when he received word from the Governor it was tantamount, apparently, to instructions or to an instruction to terminate the plaintiff; that he Colonel White never tried to investigate whatever -- quote -- "criticisms" -- unquote -- were referred to by the Governor, and he stated that he only knew that the Governor objected to plaintiff's political activity and that he so stated in his letter.

Now, Colonel White on several occasions, in writing, complimented plaintiff for his "exemplary performance" while in office. It is further significant to note that when the plaintiff resigned his position with the agency and ran for Sheriff against Sheriff Al Amiss, and was defeated in that election, that even Sheriff Amiss recommended that the plaintiff's retention after the plaintiff had been rehired to his job and later terminated.

Sheriff Belvin Bergeron, who was President of the Planning Council, testified that the only complaint he ever heard about the activities or the work, rather, -- the job performance -- of the plaintiff was from Chief Kidder and Sheriff Bergeron said to his knowledge this difference

between Chief Kidder and the plaintiff had been resolved.

Sheriff Bergeron further testified that he never knew of any instance of any kind where the plaintiff treated any agency, or member of any agency unfairly; and he testified affirmatively that the plaintiff's political activities had, in his words, no effect on his job performance. He ended his testimony by stating that the plaintiff "did an outstanding job."

After Sheriff Bergeron testified, the next witness was Joseph A. Delpit, State Representative, who made no bones about the fact that he wanted the plaintiff fired. He told the Governor that the plaintiff was not doing a good job, which, of course, conflicts with what every other person who dealt with the plaintiff had to say, most of whom

were in a much better position to know than he was. Delpit, of course, had a reason for unhappiness with the plaintiff. Mr. Delpit wanted to be appointed a member of the Council. He understood that the plaintiff, not only said he would help him get there, but he understood him to say that he could get him appointed as a member of the Council. He wasn't appointed as a member of the Council, and, of course, he knew or should have known plaintiff didn't have the power of appointment; but his rationale was that because plaintiff, as he put it, had influence enough to bring about an enlargement of the membership of the Council, and that he thought it was his influence that resulted in the appointment of -- I forget -- two people, anyway two others to Council, that he somehow double crossed

him and didn't get him appointed to the Council. Of course, the plaintiff's testimony refutes this, and is to the effect that he, the plaintiff, did recommend that Delpit be placed on the Council, but that it simply wasn't to be. But be that as it may, that's a mighty poor reason for someone to seek the dismissal of a person who is doing a good job in his employment, but I think that Mr. Delpit summed it up for what it really was when he said, and I quote, "This was nitty-gritty politics," and then when he said, "In our circles, we call it you scratch my back and I'll scratch yours." And I think that that sums up that testimony and comes pretty close to verifying the fact that as far as Mr. Delpit was concerned, this discharge was, or the request for discharge of the plaintiff

was pure politics.

Now, of course, I do take cognizance of the fact that Mr. Delpit says he did not, in so many words, request the Governor to remove the plaintiff from his job, but he was honest when he said he was sure the Governor got the message, and knew what his real purpose was, and he would be happy if he were to do so.

Now, the next witness was Mayor W. W. Dumas, There is not doubt about the fact that Mayor Dumas called the Governor seeking the discharge of the plaintiff. When Mayor Dumas was confronted with the newspaper article wherein the newspaper reporter said something about his going to the Governor, he said he didn't go to the Governor; he reconciled that on the witness stand by saying "I was telling the truth, I didn't go to

him; I telephoned him."

And then he said that when he telephoned the Governor, he didn't ask for Mr. McCormick's discharge, that he said, "I had some real choice words to say about him." And then added the comment that he would tell him personally outside the courtroom what they were.

Mayor Dumas also was quite honest in letting it be known that he was sure that the Governor got the message that he wanted the plaintiff fired. Now, why did he want the plaintiff fired? He had no criticism about Mr. McCormick's job performance according to his testimony; but he said he was running for Mayor and that he was amazed when the plaintiff attended a meeting and spoke on "behalf of my opponent." He said, "I was amazed, because I had been good to him."

This, of course, is quite irrelevant, because of the fact that there is a First and Fourteenth Amendment right for a person to speak on behalf of an opposing candidate unless it happens that that person is doing the speaking has such a patronage appointment as to make policy and fall into the category exempt by the Elrod case, which, of course, this particular position does not.

The Mayor then said that the plaintiff got his job through politics and he lost it through politics; and I have no doubt but that that is an absolutely true statement. I think that sums the case up. The only problem I have with that is that a person has a right to be appointed to this type of position through politics, but the same politicians who make the appointment do not have the right to take it away,

except for cause, if he is doing a proper job and based entirely upon political activity.

It was testified that at the meeting at the Governor's Mansion, held for the purpose apparently of seeing whether or not the Governor would change his mind and reappoint him, the Governor apparently asked the plaintiff if he was going to "delve any more in local politics?" The witness testified that when the plaintiff said that he probably would, the Governor responded that that was what he wanted to know, and, of course, thereupon his termination followed.

When Governor Edwards testified, he testified that he recommended that the plaintiff be rehired after he resigned and unsuccessfully ran for Sheriff, because he said he was

qualified, that he had experience, and -- quote -- "because I thought he had got the political animal out of his system." End quote.

The Governor testified that after he learned through telephone calls, I assume from Mayor Dumas and Mr. Delpit, that he told Colonel White to counsel with the plaintiff, as he put it, and to tell him to -- quote -- "cease and desist from political activity." End quote.

There again the only problem with that is that it's a violation of a constitutional right to prohibit a person from engaging in political activity unless that person happens to fall into the exempt category, and even then, he can't be ordered to cease and desist political activity, but of course, his patronage position may be revoked.

The Governor testified that he got complaints "from an adequate number of officials over an adequate space of time." But it was interesting to note that the names and identities of this adequate number of people were not remembered, were not produced, and apparently the only ones that could be remembered were Mayor Dumas and Mr. Delpit, both of whom, undoubtedly sought the discharge of the plaintiff; and the Governor testified to some knowledge of the dispute that I referred to earlier between Chief Kinder and the plaintiff.

So it boils down to the fact from the Governor's testimony, the only complaint that he was able to really recall outside of the general statement of an "adequate number over an adequate period of time" were that Mr. Delpit said that the plaintiff

was speaking on behalf of others, and I assume by that he means political opponents, that the plaintiff used his influence -- which was never really explained -- and Mr. Dumas said that the plaintiff used his position to further his own purposes. This also was not verified, particularly because of the fact that during the Sheriff's race, of course, the plaintiff was not holding public office at any time and the fact that he was making speeches for someone other than Mayor Dumas in the mayor's race, was certainly no violation of anybody's rights, as long as it was being done on his own time and at his own expense, and there is certainly no evidence that indicates anything to the contrary.

The Governor said that he would not have used the terminology that

Colonel White used in his letter of termination; and, of course, that is quite understandable; but whether he would have or would not have, I think the totality of the evidence in the case leaves absolutely no doubt but what Colonel White used the proper terminology in his letter and to use any other terminology would have obviously been a subterfuge.

The Governor says that it was ridiculous to say that his involvement in the last campaign was the reason to discharge, and then says that this is so because you must remember that after he ran for Sheriff and lost "I re-hired him." But that doesn't make a great deal of sense, because that isn't the last campaign that was referred to in the letter; the political activities

in the last campaign referred to was the campaign of Mayor Dumas and the campaign that brought the complaint from Mayor Dumas and Mr. Delpit.

The Governor said as a general proposition that the plaintiff caused problems for the program. I have yet to hear what problems, except the one dispute in connection with the Police Department grant.

He said that the plaintiff alienated public officials. The only public officials that he alienated apparently were Mr. Dumas because he campaigned for someone else and Mr. Delpit because he didn't get on the Board of Directors.

The Governor then said that the plaintiff's attitude at the meeting at the Mansion "confirmed my opinion that I had acted wisely." The plaintiff's attitude at the meeting at the Mansion is not

only understandable, but I would think was to be expected. After all, the meeting at the Mansion took place after the plaintiff had been illegally fired from his position; and I don't believe that the plaintiff's attitude of the discharge or termination of his employment, because the attitude and the reasons involved under the law are those which existed at the time of the termination and not attitudes or conditions that have developed since.

Now, Judge Shortess testified, William Bateman testified. You can examine their testimony with a fine-tooth comb and you don't come up with anything that makes this plaintiff a policy-maker, a confidential employee, or a person who inadequately performed

his duty. On the contrary, every single witness, with the exception of maybe the two or three that I mentioned, have attested to the good way in which the plaintiff has performed his job.

Now, Chief Kidder testified and spoke about the complaint that he had pertaining to the Burglary Interceptor Unit Grant. This is the one to which I have referred a few times as the Grant sought by the Police Department. Now, it took time to get that Grant, but it was approved; and I think the evidence shows, without question that the errors contained in the application itself were the fault of those who prepared it, and not the fault of the plaintiff; and, in any event, even Chief Kidder testified that he and the plaintiff had resolved their differences.

The last testimony is from Jewel Newman, Councilman; but actually Mr. Newman testified primarily from hearsay

evidence. He testified that someone told him that somebody else was going to get a grant that he thought he was going to get; and then when he was asked, "Did you confront Mr. McCormick with this to find out something about it?" He said, no, he didn't. This was just what somebody had told him.

So, I have to conclude from the evidence in this case that there is no doubt of any kind but that the plaintiff, Mr. McCormick, was terminated from his employment in violation of his First and Fourteenth Amendment Rights, and in violation of the provisions of Title 42, USC § 1983.

Section 1983 provides that it shall be illegal for a person to violate anybody's rights or to conspire or work with anyone else to do that. This was a conspiracy purely and simply

because there is no question but what the Governor, according to the evidence in this case, the Governor would never have terminated Mr. McCormick under these circumstances had not the two individuals, Mayor Dumas and Mr. Delpit urged him to do so.

There is no doubt but what the letter from Colonel White spoke the unvarnished truth when he said, "you are terminated because of your political activities in the last campaign." There is no doubt in my mind that the plaintiff was not a policy-maker nor was he a confidential employee, and that, therefore, he does come within the proscription of the Elrod case and its progeny. In other words, plaintiff's rights have been violated, and all of the defendants involved contributed to and were a part of the scheme to deprive the plaintiff of his right of employment in violation of the law.

These are my findings and conclusions, supported by legal briefs, on the question of the distribution of liability and the nature of the damages that should be awarded in this case.

I am inclined to believe-- and this is simply an observation for whatever it may be worth, -- at this time I am inclined to believe that Colonel White and Governor Edwards can be held only in their official capacity, for the simple reason that they were acting in an official capacity in the termination of employment. They are sued individually, in their individual capacity and in their official capacity. I am inclined to believe that they may be liable only in an official capacity.

On the other hand, I am inclined to believe that both Mayor Dumas and

Mr. Delpit may be liable in their individual capacities, because their official capacities, as I interpret the evidence had no connection, no official connection in either the establishment of the job, the hiring of personnel or the firing of personnel; and whatever liability they have, must be, I think, of a personal nature under the provisions of 1983, which attaches liability to any person who violates these rights as opposed to public officials.

I believe the case law supports those conclusions; but I make no final findings on those items. I'm going to give counsel twenty days within which to file -- each side -- simultaneous briefs proposed findings of fact, and conclusions of law directed only at the question of, first, how should a judgment be framed, accepting of course, the Court's findings that there is

liability, and that all four are culpable, how should a judgment be framed, and secondly, what is the measure of damages that can and should be awarded in this case.

After that has been done, and as I say, I suggest that you file them simultaneously, and if it develops that you need time to file reply briefs, I will be glad, upon request to consider such a request. But we will start out by saying that they will be simultaneously filed within twenty days; and at that time the case will be considered submitted unless I qrant additional time to file reply briefs.

All right, gentlemen, Court will be at recess.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

NO. 79-3753

R. C. MCCORMICK,

Plaintiff-Appellee-
Cross-Appellant,

versus

EDWIN W. EDWARDS, ETC., ET AL,

Defendants-Appellants
Cross-Appellees.

Appeal from the United States District Court
for the Middle District of Louisiana

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC

[Opinion May 28, 1981, 5 Cir., 1981, 646 F.2d 173 (1981); Rehearing Denied on June 22, 1981]

Before AINSWORTH and SAM D. JOHNSON, Circuit Judges, and HUNTER,* District Judge.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council

Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ ROBERT A. AINSWORTH, JR.
United States Circuit Judge

* District Judge of the Western District of Louisiana, sitting by designation.

APPENDIX J

42 USCS § 1983

CIVIL ACTION FOR DEPRIVATION OF RIGHTS

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

APPENDIX E

LOUISIANA CONSTITUTION (1974)

Article X. Public Officials and Employees

Section 2. Classified and Unclassified Service

Section 2. (A) Classified Service. The state and city civil service is divided into the unclassified and the classified service. Persons not included in the unclassified service are in the classified service.

(B) Unclassified Service. The unclassified service shall include the following officers and employees in the state and city civil service:

(1) elected officials and persons appointed to fill vacancies in elective offices;

(2) the heads of each principal executive department appointed by the governor, the mayor, or the governing authority of a city;

(3) city attorneys;

(4) registrars of voters;

(5) members of state and city boards, authorities, and commissions;

(6) one private secretary to the president of each college or university;

(7) one person holding a confidential position and one principal assistant or deputy to any officer, board, commission, or authority mentioned in (1), (2), (4) or (5) above, except civil service departments;

(8) members of the military or naval forces;

(9) teaching and professional staffs, and administrative officers of schools, colleges, and universities of the state, and bona fide students for those institutions employed by any

state, parochial, or municipal agency;

(10) employees, deputies, and officers of the legislature and of the offices of the governor, lieutenant governor, attorney general, each mayor and city attorney, of police juries, school boards, assessors, and of all offices provided for in Article V of this constitution except the offices fo clerk of the municipal and traffic courts in New Orleans;

(11) commissioners of elections, watchers, and custodians and deputy custodians of voting machines; and

(12) railroad employees whose working conditions and retirement benefits are regulated by federal agencies in accordance with federal law.

Additional positions may be added to the unclassified service and those positions may be revoked by

rules adopted by a commission.

APPENDIX F

LOUISIANA CONSTITUTION (1974) Art. 10 § 9:

Section 9. Prohibitions Against Political Activities

Section 9. (A) Party Membership; Elections. No members of a civil service commission and no officer or employee in the classified service shall participate or engage in political activity; be a candidate for nomination or election to public office except to seek election as the classified state employee serving on the State Civil Service Commission; or be a member of any national, state, or local committee, of a political party or faction; make or solicit contributions for any political party, faction, or candidate; or take active part in the management of the affairs of a political party, faction, candidate, or any political campaign, except to exercise his right as a citizen to express his opinion privately, to serve as a commissioner or

official watcher at the polls, and to cast his vote as he desires.

(B) Contributions. No person shall solicit contributions for political purposes from any classified employee or official or use or attempt to use his position in the state or city service to punish or coerce the political action of a classified employee.

(C) Political Activity Defined. As used in this Part, "political activity" means an effort to support or oppose the election of a candidate for political office or to support a particular political party in an election. The support of issues involving bonded indebtedness, tax referenda, or Constitutional Amendments shall not be prohibited.

APPENDIX G

LOUISIANA REVISED STATUTES

(ART. 1938 No. 179)

PART III. INTERFERENCE WITH INDIVIDUAL RIGHTS

§ 961. Political rights and freedom; restrictions forbidden; penalty; employees' right to recover damages

Except as otherwise provided in R. S. 23:962, no employer having regularly in his employ twenty or more employees shall make, adopt, or enforce any rule, regulation, or policy, forbidding or preventing any of his employees from engaging or participating in politics, or from becoming a candidate for public office. No such employer shall adopt or enforce any rule, regulation, or policy which will control, direct, or tend to control or direct the political activities or affiliations of his employees, nor coerce or influence, or attempt to coerce or

influence any of his employees by means of threats of discharge or of loss of employment in case such employees should support or become affiliated with any particular political faction or organization, or participate in political activities of any nature or character.

Any individual person violating the provisions of this Section shall be fined not less than one hundred dollars nor more than one thousand dollars, or imprisoned for not more than six months, or both; and any firm, corporation, or association violating the provisions of this Section shall be fined not less than five hundred dollars nor more than two thousand dollars.

Nothing herein contained shall in any way be construed to prevent the injured employee from recovering damages from the employer as a result of suffering caused by the employer's violations of

this Section.

962. Discharge because of political opinions; attempt to control votes; penalty

Any planter, manager, overseer or other employer of laborers who, previous to the expiration of the term of service of any laborer in his employ or under his control, discharges such laborer on account of his political opinions, or attempts to control the suffrage or vote of such laborer by any contract or agreement whatever, shall be fined not less than one hundred dollars, nor more than five hundred dollars and imprisoned for not more than one year.

963. Purchase of merchandise from particular seller; coercoin prohibited; penalty

No person shall coerce or require any of his employees to deal with or purchase any article of food, clothing or merchandise of any kind whatsoever from any person, or exclude from work, punish, or blacklist any of his

employees for their failure to deal with another or to purchase any article of food, clothing or merchandise whatsoever from another or at any place whatsoever. Nothing contained in this Section shall apply to the sale and purchase of uniforms.

Whoever violates the provisions of this Section shall be fined not less than fifty dollars nor more than one hundred dollars, or imprisoned for not less than thirty days nor more than ninety days, or both.

APPENDIX H

March 24, 1976

Mr. R. C. McCormick, Program Director
Capital District Law Enforcement
Planning Council, Inc.
Dallas Building
1723 Dallas Drive
Baton Rouge, LA 70806

Dear Mr. McCormick:

A report has reached the Governor's Office that you have indulged in criticism of officials connected with the Baton Rouge city government, which is most disturbing to me.

It is very distasteful to me to have to bring this to your attention, but I feel that it is necessary because of the ramifications that could ensue if this should be found to be true and continuing.

The individual in the Governor's

Office who brought this to my attention shares my hope that this will not continue and that no subsequent action will be necessary.

I think it is needless to point out that a good, harmonious local relationship is necessary to the success of our mission, and certainly this cannot be achieved unless we maintain an atmosphere of trust and support.

Sincerely yours,

WINGATE M. WHITE
Executive Director
cc: Sheriff Belvin F. Bergeron

APPENDIX I

May 17, 1976

Mr. R. C. McCormick, Program Director
Capital District Law Enforcement
Planning Council, Inc.
Dallas Building
1723 Dallas Drive
Baton Rouge, LA 70806

Dear Mr. McCormick:

Your involvement in the last political election has created a situation which is detrimental to the well-being of the Louisiana Commission on Law Enforcement.

I am therefore placing you on annual leave immediately, and your employment will be terminated effective at the close of business the final day of your allowable annual leave, which will be May 24, 1976.

Sincerely yours,

WINGATE M. WHITE

Executive Director

APPENDIX K

AMENDMENT 1

RELIGIOUS AND POLITICAL FREEDOM

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT 14

SECTION 1. CITIZENS OF THE UNITED STATES

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of

citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Appendix to the Petititon for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been served on the Honorable R. Gordon Kean, Jr., attorney for Woodrow W. Dumas, on Camille Gravel, attorney for Edwin W. Edwards and Wingate White, and on William H. Cooper, attorney for Joseph A. Delpit, by depositing said copies in the United States Mail, postage prepaid, this 25th day of August, 1981.

I further certify that all parties required to be served have been served.

Leo J. Berggreen

LEO J. BERGGREEN
Suite 6
3623 Perkins Road
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Elliott W. Atkinson Jr.

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Opposition

Office - Supreme Court, U.S.
FILED
OCT 8 1981
ALEXANDER L. STEVAS
CLERK

No. 81-383

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

R. C. McCORMICK

Petitioner, Plaintiff-Appellee
Cross-Appellant

versus

EDWIN EDWARDS, INDIVIDUALLY AND AS GOVERNOR OF LOUISIANA, WINGATE WHITE, INDIVIDUALLY AND AS EXECUTIVE DIRECTOR OF THE LOUISIANA COMMISSION OF LAW ENFORCEMENT AND ADMINISTRATION OF CRIMINAL JUSTICE, ET AL,

Respondents, Defendants-Appellants
Cross-Appellees

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CAMILLE F. GRAVEL, JR.
Attorney of Record
P. O. Box 44071
Baton Rouge, Louisiana 70804
(504) 346-0600

ORTLIEB PRESS BATON ROUGE

QUESTIONS PRESENTED

1. Whether a non-civil service state employee is constitutionally protected from being discharged for active political involvement.

2. Whether the state has a compelling interest to restrict the exercise of first amendment rights by a non-civil service employee when the exercise of such rights interferes with the efficient operation of a government office.

3. Whether the reasoning underlying the history of restriction of political activities of government employees is applicable to a non-civil service government employee.

4. Whether the rule of *Elrod v. Burns* and *Branti v. Finkel*, should be expanded to apply to political speech, activities, and association, rather than just to political patronage situations.

5. Whether punitive damages should be awarded for the firing of a gubernatorial appointment serving at the will of the governor.

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No. 81-383

IN THE

SUPREME COURT OE THE UNITED STATES

OCTOBER TERM, 1981

R. C. McCORMICK
Petitioner, Plaintiff-Appellee
Cross-Appellant

versus

EDWIN EDWARDS, INDIVIDUALLY AND AS GOVERNOR OF LOUISIANA, WINGATE WHITE, INDIVIDUALLY AND AS EXECUTIVE DIRECTOR OF THE LOUISIANA COMMISSION OF LAW ENFORCEMENT AND ADMINISTRATION OF CRIMINAL JUSTICE, ET AL,
Respondents, Defendants-Appellants
Cross-Appellees

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

A. Facts Surrounding Plaintiff's Dismissal

Pursuant to Executive Order No. 57, issued by Governor Edwin Edwards on January 29, 1974, the Louisiana Commission on Law Enforcement and Administration of Criminal Justice was established. The basic purpose of this commis-

sion was to serve as a channelling agency handling the Federal Contributions of the Law Enforcement Assistance Administration in Washington, which provided grants to local law enforcement agencies.

The Executive Director, Wingate White, is the chief executive officer of the Commission staff. As Executive Director he is the appointing authority for and exercises administrative supervision over the District Program Directors who are responsible to him for the accomplishment of all tasks assigned to the law enforcement planning district agencies by the State Law Enforcement Planning Agency, including the preparation of district plans and the preparation of projects in the respective law enforcement planning districts.

Pursuant to this order there were created nine Law Enforcement Planning Districts, including the Capital Law Enforcement Planning District. The district planning agencies headed by District Program Directors were to have all of the functions of the State Planning Agency applicable within their respective districts.

The law enforcement planning district advisory councils were created to perform functions similar to those prescribed for the Commission in planning, developing, coordinating, and administering criminal justice improvement programs within their respective law enforcement planning districts.

R. C. McCormick was appointed by the Governor through Wingate White as District Program Director of the Capital District Law Enforcement Planning Council.

Governor Edwards received a number of complaints that Mr. McCormick was participating actively in local political campaigns and was using his position and influence as District Program Director to further his own political ambitions,

resulting in a deterioration of relationships with local officials.

On March 24, Mr. White sent a letter to Mr. McCormick informing him that a good harmonious local relationship was needed between Mr. McCormick and those officials with whom he came in contact. The letter stated that Mr. McCormick had indulged in criticism of officials connected with the Baton Rouge city government, and it was hoped that this would not continue and that no subsequent action would be necessary.

After the Governor received additional complaints, on May 11, 1976, Mr. White sent a letter to Mr. McCormick stating that:

> Your involvement in the last political election has created a situation which is detrimental to the well-being of the Louisiana Commission on Law Enforcement. I am therefore placing you on annual leave immediately, and your employment will be terminated effective at the close of business the final day of your allowable annual leave, which will be on May 24, 1976.

Prior to the effective termination date, the Governor met with McCormick and numerous local board members in order to discuss the dismissal. Governor Edwards inquired as to whether Mr. McCormick intended to stay actively involved in local campaigns. Mr. McCormick advised him that he did. The Governor did not rescind the dismissal.

B. **Proceedings Below**

On September 7, 1976, plaintiff filed a complaint alleging a violation of his civil rights under 24 U.S.C. 1983, et seq. and the First and Fourteenth Amendments by the defendants Edwin Edwards and Wingate White. The complaint was later

amended to add defendants Delpit and Dumas, local officials who had made complaints about McCormick.

After trial, the court held that the discharge of an employee in the position of the plaintiff was not permitted by the rule established in *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) in that McCormick was neither a confidential nor a policy-making employee. The court further found, in its written reasons, that all defendants were liable in their individual capacities and not in their official capacities. The opinion of the District Court is reported as *R. C. McCormick v. Edwards*, et al. 479 F.Supp. 295 (M.D. La. 1979).

Defendants subsequently filed a Motion for New Trial on the basis that the recent case of *Stegmaier v. Trammell*, 597 F.2d 1027 (5th Cir. 1979), had altered and expanded the exceptions to the *Elrod v. Burns* rule. The motion was denied and the defendants appealed the judgment of the trial court.

The case was then heard by the United States Fifth Circuit Court of Appeals and judgment was entered on May 23, 1981. *R. C. McCormick v. Edwards, et al*, 646 F.2d 173 (5th Cir. 1981). The Court of Appeals reversed the judgment of the trial court, stating that the court agreed "that McCormick's activities are not protected by *Elrod* or otherwise since the State's interest in regulating this type of political involvement outweighs the employee's interests." The Court of Appeals felt that this was dispositive of the case and felt it unnecessary to address issues of personal liability or status of the employee as a confidential or policymaking employee. The court held that a non-civil service state employee, engaged neither in policymaking nor confidential duties, is not constitutionally protected from being discharged for becoming actively involved in a partisan election campaign.

SUMMARY OF ARGUMENT

I. Constitutional Right of Involvement in Political Activity

It has been established that there exists a constitutional right of political involvement. But there are certain situations in which a government employer can place restrictions on the political activities if the government has a compelling interest which would override the interests of the employees first amendment rights.

II. McCormick's Claim Under Elrod and Branti

The case at hand is alleged to be a patronage decision, but it is not. The patronage cases refer to situations in which employees are discharged solely because of their political affiliation or belief. It is clear that such is not the case in the matter at hand, since Mr. McCormick was discharged for his political *activities*.

III. The Interest of the State

In the instant matter, the state does in fact have a legitimate interest which should override the petitioner's first amendment rights. The potential for abuse in the position formerly held by the petitioner is such that restriction of the petitioner's political activities was essential.

IV. Van Ooteghem vs. Gray

The petitioner contends that recent cases stand for the proposition that a state cannot prevent the speech of its citizens. It is argued herein that the cases relied upon by petitioner are inapplicable since the cases refer to private citizens and fail to consider the possibility of a compelling state interest.

V. Inapplicability of La. R.S. 23:961

The petitioner also contends that a Louisiana statutory

provision overrides the state's interest in discharging an employee who interferes with the efficient operation of state government. Such is not the case, since such an interest overrides constitutional protections, much less a state statutory provision.

VI. Applicability of Hatch Act Cases

The Hatch Act cases are applicable to the case at hand, since they offer valid analogies to the activities of non-civil service employees.

VII. Award of Punitive Damages

The award of punitive damages herein is not supported by the findings of the appellate court.

VIII. Jurisdiction

The issues presented herein have already been decided by this Court, and the circuit courts have remained consistent in following the decisions previously rendered by the Court.

ARGUMENT

It was the opinion of the Fifth Circuit that an unclassified governmental employee could be discharged for any reason, even for no reason at all, as long as he is not fired for a constitutionally impermissible reason. Mr. McCormick was discharged for a constitutionally impermissible reason, that is, he was fired for actively supporting a partisan candidate for political office. But the Fifth Circuit felt that the history of the regulation of political activities justified the ruling that active political activity, even by an unclassified employee, interferes with the legitimate interests of the state government. Appellees respectfully suggest that the opinion of the Fifth Circuit is correct and should be upheld.

I. Constitutional Right of Involvement in Political Activity

Initially, it is necessary to inquire into the specific legal question of the right of a government employer to place limitations on an employee's participation in partisan politics without violating the First Amendment of the U. S. Constitution (and, in this case, the Fourteenth).

Certainly one of the most sweeping sets of restrictions on such activity is contained in the Hatch Act, 5 U.S.C. 7321 et seq., which prohibits federal employees from, inter alia, taking "an active part in political management or in political campaigns." 5 U.S.C. 7324(a) (2) The Supreme Court upheld these restrictions after examination under the light of the First Amendment in *United Public Workers of America v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556 (1947). Justice Reed, at 569, for the majority wrote as follows:

> The provisions of §9 of the Hatch Act and the Civil Service Rule 1 are not dissimilar in purpose from the statutes against political contributions of money. The prohibitions now under discussion are directed at political *contributions of energy* by Government employees. These contributions, too, have a long background of disapproval. Congress and the President are responsible for an efficient public service. If, in their judgment, efficiency may be best obtained by prohibiting active participation by classified employees in politics as party officers or workers, we see no constitutional objection. (Emphasis added.)

In *Mitchell* the workers were not policy-level, nor even administrative level employees, but rather "industrial" workers. It was significant to the Court that it was partisan party politics that was off-limits, not opinions on important issues.

> It is only partisan political activity that is interdicted. It is *active participation in political manage-*

> *ment and political campaigns.* Expressions, public or private, on public affairs, personalities and matters of public interest, not an objective of party action, are unrestricted by law so long as the Government employee does not direct his activities toward party success. (Emphasis added.) *Mitchell*, 67 S.Ct. at 570.

In *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 93 S.Ct. 2880 (1973), the court held that Congress can constitutionally forbid federal employees from engaging in clearly identifiable acts of political management and political campaigning, actively participating in fund-raising activities for a partisan candidate or political party, becoming a partisan candidate for, or campaigning for, an elective public office, actively managing the campaign of a partisan candidate for public office, initiating or circulating a partisan nominating petition or soliciting votes for a partisan candidate for public office, or serving as a delegate, alternate or proxy to a political party convention. See also *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2980 (1973).

The cases cited above refer, of course, to employees of the federal government, whereas the instant case refers to a non-civil service state employee. But the analogies are obvious. The jurisprudence has recognized that active political participation by government employees interferes with the efficiency of the operation of the government. The same reasoning should also apply to the case before the Court, since active political involvement by Mr. McCormick, even though not a classified civil service employee, interfered with the smooth operation of the Capital Law Enforcement Planning District.

The jurisprudence consistently tests restrictions by balancing the interests they serve against First Amendment rights, always cognizant of the fact that attaching a condition

to certain kinds of employment is not the same as direct infringement by the Government of freedom of speech.

The cases that have found First Amendment violations serve to clarify the balancing test. Several leading Supreme Court cases establish the proposition that some government employment, at least, cannot be denied as a result of the employee's exercise of First Amendment rights. *Perry v. Sinderman*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed. 570 (1972); *Pickering v. Board of Education*, 391 U.S. 563, 87 S.Ct. 1731 (1968); *Keyishan v. Board of Regents*, 385 U.S. 589, 87 S.Ct. 675 (1967). Two common threads unite these cases and distinguish them from the decisions cited above. 1) The employees are *teachers*, and 2) the protected speech is *issue-oriented*, not partisan politics. As Justice Brennan explains in *Keyishan*, 87 S.Ct. at 683:

> Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. *Shelton v. Tucker*, supra, 364 U.S., at 487, 81 S.Ct., at 251. The classroom is peculiarly the market place of ideas.

The courts have treated teachers differently than any other public employee. Again, however, the question is the efficiency of government weighed against the First Amendment rights of the employee. Those rights are given greater weight when applied to a schoolteacher, when efficiency does not require a restriction on the rights. That is not the case here.

II. McCormick's Claim Under Elrod and Branti:

It is the contention of R. C. McCormick that his discharge was unconstitutional. In support of this contention he relies on the recent Supreme Court cases of *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), and *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980). *Elrod* held that the dismissal or threat of dismissal from government employment of a nonpolicymaking official because of his political belief and affiliation abridged his First Amendment rights of speech and association by imposing an unconstitutional condition upon the employment. On the other hand, patronage dismissals of government officials holding policymaking positions were said to be justified by a compelling state interest in effective implementation of policies of the new administration. *Elrod* concerned the dismissal by the sheriff of several of his employees. It is the contention of Mr. McCormick that a broad reading of the *Elrod* rule would apply not only to political affiliation, but also to political speech, activities, and belief. This argument, which was rejected by the 5th Circuit, is contradicted in the U.S. Supreme Court's decision in *Branti*, in which the court states that in order to dismiss an employee an employer must demonstrate that party affiliation is an appropriate requirement for the effective performance of the office involved. *Branti*, 100 S.Ct. at 1290. *Branti* concerned the proposed termination of Assistant County Public Defenders solely because they had not been recommended or sponsored by the in-party caucus.

In *Elrod*, Justice Brennan, in a plurality opinion, cites *Keyishan*, supra, and *Perry v. Sinderman*, supra, as the support structure for the Court's decision on patronage dismissals. *Elrod*, 96 S.Ct. at 2683.

The justice distinguishes the Hatch Act cases, *CSC v. Letter Carriers*, supra, and *Mitchell*, supra, as follows:

> In both of those cases, legislative restraints on political management and campaigning by public employees were upheld despite their encroachment on First Amendment rights because, inter alia, they did serve in a necessary manner to foster and protect efficient and effective Government. Interestingly, the activities that were restrained by the legislation involved in those cases are characteristic of patronage practices. *Elrod*, 96 S.Ct. at 2686.

Elrod goes on to make clear that political belief and association enjoy greater Constituional protection than political campaigning and management:

> To be sure, *Letter Carriers* and *Mitchell* upheld Hatch Act restraints sacrificing political campaigning and management, activities themselves protected by the First Amendment. But in those cases it was the Court's judgment that congressional subordination of those activities was permissible to safeguard the core interests of individual belief and association. Subordination of some First Amendment activity was permissible to protect other such activity. Today, we hold that subordination of other First Amendment activity, that is, patronage dismissals, not only is permissible, but also is mandated by the First Amendment. And since patronage dismissals falls within the category of political campaigning and management, this conclusion irresistably flows from *Mitchell* and *Letter Carriers*. For if the First Amendment did not place individual belief and association above political campaigning and management, at least in the setting of public employment, the restraints on those latter activities could not have been judged permissible in *Mitchell* and *Letter Carriers*. *Elrod*, 96 S.Ct. at 2688-2689.

Branti modified the rule of *Elrod*. Whereas *Elrod* had centered on whether the discharged employee was a "policymaker" or "confidential employee", *Branti* ruled that the question is whether the hiring authority can demonstrate that

party affiliation is an appropriate requirement for the effective performance of the public office involved. If the First Amendment protects a public employee from discharge based on what he has said, it must also protect him from discharge based on what he believes. *Under this line of analysis, unless the Government can demonstrate "an overriding interest"*, (citing *Elrod*) 427 U.S. at 368, 96 S.Ct. at 2687, *"of vital importance," id.* at 362, 96 S.Ct. at 2684, *requiring that a person's private beliefs conform to those of the hiring authority, his beliefs cannot be the sole basis for depriving him of continued public employment.* (footnote omitted) 100 S.Ct. at 1293.

As the 5th Circuit stated in its opinion herein:

> McCormick's reliance on *Elrod* and *Branti* is misplaced. These cases are clearly limited to situations in which employees are discharged solely because of their political affiliation or beliefs. McCormick does not contend that he was terminated because he is a Republican, a Democrat, or a member of any particular party, or because he held certain political beliefs. He was discharged because of his active participation in the 1976 Baton Rouge mayoralty campaign. Neither *Elrod* nor *Branti* deals with a situation similar to the one now before this court. *McCormick*, at 178.

Since the Supreme Court modified the *Elrod* rule in *Branti*, the test has remained whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for effective performance of the public office. *Branti*, 100 S.Ct. at 1290. Furthermore, the Courts have retained the balancing test of *Elrod*, in which Justice Brennan stated:

> (I)f conditioning the retention of public employment on the employee's support of the in-party is to survive constitutional challenge, it must further some

> vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights. *Id.* at 363, 96 S.Ct. at 2685.

As was stated in *Branti*:

> (I)f an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency. 100 S.Ct. at 1294.

The cases decided since *Elrod* and *Branti* have sought to determine if a constitutional right exists and has been violated, which burden rests with the plaintiff, and then whether the defendant rebutted this by showing with sufficient evidence that the same employment decision would have been reached regardless of the constitutionally protected conduct. *Tanner v. McCall*, 625 F.2d 1183 (5th Cir. 1980). Part of the plaintiff's burden is proving that the defendant's intent to discriminate or violate the plaintiff's constitutional rights was a substantial motivating factor in the employment decision. *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), *Tanner v. McCall*, supra. The plaintiff has the initial burden of proving by a preponderance of the evidence that the protected conduct was a substantial or motivating factor. *Nekolay v. Painter*, 653 F.2d 1164, 1168 (7th Cir. 1981). Once the plaintiff has met his burden, the question then becomes whether the State's interest in prohibiting its employees from engaging in such activities outweighs the employee's rights. In the case of *Serna v. Manzano*, 616 F.2d 1165 (10th Cir. 1980), the court, in reviewing the action of the trial court, stated:

> The trial judge applied the rule of *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) which calls for a balancing be-

> tween the right of a public employee to freely comment, believe and associate in matters of public interest and concern, and the competing interest of the State, as an employer in promoting the efficiency of the public service it performs through its employees. *Id.* at 1166.

In *Serna*, as in the instant case, the Court determined that the State's interest in having an efficiently run public (sheriff's) office free from dissension, distrust, and continuing discord overrode the interest of the plaintiff in the protection of his First Amendment liberties.

The opinions in the above cited cases are consistent with the opinion of the 5th Circuit in the instant case. As Judge Ainsworth stated:

> Thus, state and federal governments can constitutionally discharge civil service employees for precisely the same activities engaged in by McCormick. It would be an anomaly for us to hold that Governor Edwards and Wingate White could not discharge McCormick, a non-civil servant serving at their will, for engaging in activities for which a civil servant could be discharged. McCormick's constitutional rights are no broader than those of other government workers. He can be discharged for any reason, even for no reason at all, as long as he is not fired for a constitutionally impermissible reason. Thus, his discharge was not unlawful and the district court erred in ruling to the contrary. *McCormick* at 179.

It is respectfully urged that the decision of the Fifth Circuit is correct and in line with not only the decisions of the Supreme Court, but also with the decisions of the other circuit courts. The Fifth Circuit felt that the state did have a compelling interest in preventing McCormick's active political involvement.

III. The Interest of the State

In order to evaluate the legitimate governmental interests Governor Edwards and the Fifth Circuit considered as mandating restrictions, it is necessary to examine the duties and responsibilities of the position McCormick occupied, as well as the abuses to which the position was subject, either actually or potentially.

Certain facts are clear without regard to whether McCormick is thought to be a policymaker, confidential employee, or in some other category that permits dismissal without First Amendment protection. Every bit of testimony that addresses the issue indicates that McCormick's position required him to advise local governmental officials on procedures and guidelines for receiving Federal grants. If the dangers involved in permitting industrial workers to engage in partisan politics are sufficient to permit restrictions without offending the First Amendment, *Mitchell, supra*, then *a fortiori* the potential for abuse (and the testimony indicates actual abuse) in this situation *demand* restrictions. Without such restrictions, Federal grant money is subject to being treated as a kind of indirect campaign contribution, paid for by the taxpayer and distributed by an individual state employee to help those public officials he favors. And even if no such abuse ever took place, the potential for loss of public trust is great. Mayor Dumas' shock at seeing the Federal grant administrator from the Governor's office actively participating in his opponent's campaign is, in this context, understandable. And the Governor's action in dismissing McCormick was clearly justified by legitimate governmental interests. Such was the finding of the Fifth Circuit, and it is respectfully urged that that decision should stand.

IV. Van Ooteghem v. Gray

In arguing that the state has no right to restrict the activities of an unclassified state employee, Mr. McCormick

relies on the recent case of *Van Ooteghem v. Gray*, 628 F.2d 488 (5th Cir. 1980). The case stands for the proposition that, absent a compelling state interest, a state cannot prevent the speech of its citizens. This case is inapplicable for two reasons. The first is that the case applies to the general public and not to state employees. The second is that there has been found herein by the Fifth Circuit a compelling state interest because Mr. McCormick's activities caused substantial interference with the operation of a public department.

V. Inapplicability of La. R.S. 23:961

Mr. McCormick relies upon Louisiana Revised Statute 23:961 for the proposition that the Governor, just like any other employer, is prohibited from threatening to discharge or from discharging any employee because of the employee's political activities or associations. Respondents respectfully submit that this statutory provision is inapplicable in the instant case since it was determined by the Fifth Circuit that the state had an interest which superceded even *constitutional* provisions, much less a state regulation. And the state regulation ruled on by petitioner was meant for the general public, not government employees whose rights have been restricted due to the nature of their jobs.

VI. Applicability of Hatch Act Cases

As to the applicability of the cases interpreting the validity of the Hatch Act type statutes which restrict the polical activities of classified government employees, these cases are cited by both respondent and the Fifth Circuit to emphasize the reasons behind and the history of restricting the rights of government employees in order to insure the effective operation of government. The applicability of these cases speaks for itself.

VII. Award of Punitive Damages

Petitioner also claims punitive damages should be award-

ed. ". . . Punitive damages are disfavored by the law and are to be allowed only with caution and within narrow limits." *Lee v. Southern Home Sites Corp.*, 429 F.2d 290, 294 (5th Cir. 1970). An award of punitive damages can be made only where defendant's conduct has been wanton and malicious, in gross disregard of others or in bad faith, and is necessary to punish the defendant. *Williams v. Yazoo Valley-Minter City Oil Mill, Inc.*, 469 F.Supp. 37, 52 (1978). No such conduct was found by the Fifth Circuit or the District Court, and such damages should be disallowed.

VIII. **Jurisdiction**

A review on writ of certiorari is a matter of judicial discretion rather than a matter of right. As such, writs will only be granted when there are important and special reasons therefor. Rule 17, Supreme Court Rules. It is contended that there are no such important reasons in the instant case. Rule 17(a) of the Supreme Court Rules offers examples of the character of reasons that will be considered:

> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and unusual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

In the cases decided since the Supreme Court's decisions in *Elrod v. Burns* and *Branti v. Finkel, supra*, the appellate courts have remained consistent with one another. The courts have recognized that *Branti* has modified the test of *Elrod*. *Delong v. United States*, 621 F.2d 618 (4th Cir. 1979).

In *Wren v. Jones*, 635 F.2d 1277 (7th Cir. 1980) and *Nekalny v. Painter*, 653 F.2d 1164 (7th Cir. 1981), the Seventh Circuit recognized the new *Branti* test and elaborated on

the burden of proof required. In *Wren* and *Nekalny*, the court asks whether political association was the sole basis of the layoffs, and, if not, the extent of the role the discharged employees' political association must have played in the decision to engage in the layoffs in order to find a First Amendment violation. The court further acknowledged that in some cases there must then be a balancing test between the interest of the government and the protection of the employees' First Amendment rights.

In *Serna v. Manzano*, 616 F.2d 1165 (10th Cir. 1980), the Tenth Circuit used the balancing test referred to in *Wren*, supra. The court found that the discharged employees First Amendment rights could be restrained because of the overriding state interest in having efficiently run offices free from dissension, distrust and discord.

And of course the Fifth Circuit remained consistent with the interpretations of *Branti* and *Elrod* in the other circuits in its opinion in the instant case as well as in *Tanner v. McCall*, 625 F.2d 1183 (5th Cir. 1980). In *Tanner*, supra, the Court inquired into the basis for the dismissals in order to determine if there was an infringement on First Amendment freedoms. The court ruled that an employer could justifiably dismiss an employee when the exercise of their First Amendment rights are required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency.

It is apparent that the question before the court has been considered fully by both this Honorable Court as well as the circuit courts. The opinions throughout have remained totally consistent. The circuit courts are applying the balancing tests expressed in *Elrod* and *Branti* uniformly and coming to factual conclusions based on the law so expressed. That is the procedure applied by the Fifth Circuit in this case, that circuit has not deviated from the established law. There is no con-

flict between the circuits or the state courts, and there is certainly no departure from the accepted and usual course of judicial proceedings. In short, there is no reason for the Court to relitigate a point that was settled in *Elrod* and *Branti* and has since been uniformly followed by the lower courts.

CONCLUSION

The decision of the Fifth Circuit is totally in line with the decisions of the Supreme Court and the circuit courts. The court reasoned that it would be an anomoay to hold that Mr. McCormick, who served at the will of the governor, could not be discharged when state and federal employees can be discharged for precisely the same reasons. Mr. McCormick's discharge was justified by the interest of the state government in maintaining efficient operations. The activities involved in by Mr. McCormick interfered with the efficient performance of his duties and thus the state had a legitimate justification for Mr. McCormick's dismissal. It is respectfully submitted that it would serve no purpose for this Court to reconsider the issues presented herein, since they have already been well settled by prior jurisprudence. It is urged that the Petition for Writ of Certiorari be denied, thus affirming the decision of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been served on the Honorable Gordon Kean, Jr., attorney for Woodrow W. Dumas, on William H. Cooper, attorney for Joseph A. Delpit, and on Elliot W. Atkinson and Leo J. Bergreen, attorneys for R. C. McCormick, by depositing said copies in the United States Mail, postage prepaid, this _____ day of October, 1981.

I further certify that all parties required to be served have been served.

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